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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BOYD WALTON, JR., *et ux, et al.*,
Petitioners,

v.

COLVILLE CONFEDERATED TRIBES, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Indian allottees should be held incapable of conveying their vested property rights contrary to the express intent of Congress?

2. Whether, if a reasonable diligence test is to be imposed on non-Indian successors to Indian allottees, it should, or can consistent with due process and equal protection, require more than is reasonably possible, or an intent to do more than is reasonably possible?

LIST OF PARTIES BEFORE NINTH CIRCUIT

The parties before the Ninth Circuit were petitioners Boyd Walton, Jr., et ux, et al., and respondents Colville Confederated Tribes ("Tribe"), the United States of America, and the State of Washington.

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OPINIONS BELOW

The District Court's initial decision in this case is reported as *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. Wash. Oct. 25, 1978).

The initial opinion of the Ninth Circuit on the first appeal is not reported. *Colville Confederated Tribes v. Walton*, Slip Op. (9th Cir. August 20, 1980) ("*Walton I*"). This initial opinion was withdrawn by *Order Granting Rehearing and Denying En Banc Suggestion* (9th Cir. June 1, 1981), which is not reported.

The second opinion on the first appeal is reported as *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. June 1, 1981), *cert. denied*, 454 U.S. 1092 (1981) ("*Walton II*").

The District Court's decision on remand from *Walton II* is not reported. *Colville Confederated Tribes v. Walton*, Slip Op. (E.D. Wash. August 31, 1983) ("*Walton remand*").

The Ninth Circuit's opinion on the second appeal is reported as *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. January 21, 1985) ("*Walton III*"). The Ninth Circuit's order denying rehearing and the suggestion for rehearing en banc, is reported as *Colville Confederated Tribes v. Walton*, 758 F.2d 1324 (9th Cir. April 22, 1985).

The Ninth Circuit's opinion in *Walton II*, the District Court's opinion on remand (*Walton remand*), and the Ninth Circuit's opinion in *Walton III*, as well as the Ninth Circuit's order denying rehearing and en banc suggestion, are printed in the Appendix.

STATEMENT OF JURISDICTION OF THE COURT

The judgment of the Court of Appeals was entered on January 21, 1985. The Order denying rehearing was entered on April 22, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. 1251(1).

CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED

U.S. Constitution, amend. V (Due Process Clause):

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, amend. XIV, Sec. 1 (Due Process and Equal Protection Clauses):

> No State shall . . . deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sections 5 and 7 of the General Allotment Act (Dawes Act), Act of February 8, 1887, Ch. 119, 24 Stat. 388, 25 U.S.C. §§ 348 and 381:

> Section 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the

legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in the case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. . . .

Section 7. In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by an riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

STATEMENT OF THE CASE

The Colville Indian Reservation in the State of Washington was created by Executive Order in 1872, and its present exterior boundaries were established by Congress some 20 years later. Act of July 1, 1892, 27 Stat. 62. In accordance with the Act of March 22, 1906, Pub. L. No. 59-61, ch. 1126, 34 Stat. 80, and an effectuating Presidential Proclamation of 1916, Reservation lands were allotted to individual members of the Tribes and held for them in trust pursuant to the General Allotment Act of February 8, 1887, ch. 119, 24 Stat. 388, 389, 25 U.S.C. § 331 *et seq.*; some allotments were thereafter conveyed in fee "free of all charge or incumbrance whatsoever" to the Indian allottees and thereafter conveyed in fee to non-Indians.

The Walton petitioners ("Walton") are non-Indian successors in interest to Indian allottees who conveyed to Walton's non-Indian predecessors in title between 1921

and 1925. Walton now owns in fee three of seven adjoining original allotments, ranging from north to south along the No Name hydrological system on the Colville Reservation. The other four allotments ("Indian trust allotments")—*i.e.*, the two allotments to the north of the Walton allotments, as well as the two to the south—are still held in trust by the United States for Indiain allottees, or in one case for the Colivlle Confederated Tribes ("Tribe").

The No Name hydrological system consists of three elements: (1) an aquifer underlying the Indians' two northern allotments and the northern tip of the Walton property; (2) No Name Creek which arises from various springs located on the northernmost portion of the Walton property and flows south across it and the two southerly Indian-owned allotments into Omak Lake; and (3) Omak Lake, which lies wholly within the Reservation, has no outlet, and is saline. The northernmost Indian allotment is traversed by, and can be irrigated from Omak Creek, another Reservation stream which is not connected with the No Name hydrological system.

The Indian trust allotments which are irrigable only by use of No Name hydrological system water contain a total of 166.6 practicably irrigable acres, of which only 107.2 are now being irrigated by the Tribe. When Walton acquired the Walton allottments from non-Indian predecessors in title in 1948. only about 30 acres were being irrigated because this was "the maximum extent [of irrigation] reasonably possible given the prevailing economic and technological conditions." *Walton remand* at 7 (App. p. 22a). But with "not only reasonable, but expeditious" diligence (*i.e.*, by financing the first power line into the area in 1949, and taking advantage of aluminum pipe which had just become available), Walton almost immediately irrigated, and since has consistently irrigated, 104 of the total of 170 practicably irrigable acres contained in his allotments. *Walton remand* at 4-7 (App. pp. 22a-24a).

The annual duty of water required for irrigation in the No Name drainage area is 4 acre feet. The average

annual flow of the No Name hydrological system is 1,000 acre feet, less than the amount needed (1346.4 acre feet) to irrigate all practicably irrigable land irrigable only from the system.

In 1968, the Tribe, with the help of the Department of the Interior, introduced Lahontan Cutthroat trout into Omak Lake as a replacement fishery for the Tribe's historic fishing grounds on the Columbia River. The federal government provided, and continues to provide, fish hatchery fingerlings to maintain the stock of trout in the lake. Prior to 1970 the Tribe attempted to cultivate No Name Creek's lower reaches in an effort to establish fresh water trout spawning grounds there, but irrigation uses diminished the water flow during spawning season.

In 1970, the Tribe brought suit against Walton in the United States District Court for the Eastern District of Washington invoking the jurisdiction of the Federal District Court pursuant to 28 U.S.C. 1331. The Tribe claimed exclusive "*Winters* rights" to the waters of the Reservation, citing this Court's decisions in *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963), and related cases. The State of Washington intervened on behalf of Walton who, in addition to his claim to have succeeded to a *Winters* right as an appurtenance to his former Indian allotments, alternatively claimed state-law water rights to irrigate some 65 acres or more under water rights certificates issued by the State of Washington in 1949 and 1950.

The United States declined to intervene on behalf of the Tribe but instead brought a separate action against Walton and the State asserting, inter alia, that the Secretary of the Interior has exclusive jurisdiction to administer all of the water resources of the Reservation. The United States also sought a declaration that Walton's state water certificates were null and void, and an order enjoining the State from issuance of further certificates within the Reservation. The two suits were con-

solidated for trial. The Tribe amended its complaint to assert a right to the flow of No Name Creek to create a spawning ground for Lahontan Cutthroat trout.

The District Court, in *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. Wash. Oct. 25, 1978), held that the Indians had a reserved *Winters* doctrine water rights, with an 1872 date-of-reservation priority, to sufficient water in the No Name hydrological system to irrigate all their 166.6 acres of retained practicably irrigable lands irrigable only from the system (666.4 acre feet), whether now or ever under irrigation, and that the portion of their reserved right not now used for irrigation (237.6 acre feet) could potentially be used to create spawning grounds for the introduced trout. However, because the United States was supplying fingerlings, the District Judge declined to adjudicate any of the unused portion of the Indians' reserved right explicitly for this purpose.

The District Court held that Walton did not acquire *Winters* rights with an 1872 priority with respect to the 104 irrigated acres of the Walton allotments, but rather that the *Winters* rights which had been appurtenant to these allotments while still in Indian ownership (104 x 4 acre feet = 416 acre feet per year), had disappeared upon purported conveyance to non-Indians. The District Court accordingly held that at the time Walton acquired the allotments he acquired only a right to irrigate the 32 acres then under irrigation, with a junior priority as of the date of its first use, and that Walton now has only such other junior water rights as he obtained subsequently: *i.e.*, the right under federal law to use Indian reserved water until put to use by the Indians; and rights to water over and above the Indian reserved water, *i.e.* rights to so-called "excess waters," pursuant to the state prior appropriation water law.

On the first appeal to the Ninth Circuit, a panel of the court in its first opinion (later withdrawn) accepted the District Court's erroneous reasoning and sustained its holding that non-Indians could not acquire *Winters*

rights by purchase. *Colville Confederated Tribe v. Walton*, Slip Op. (9th Cir., August 20, 1981) ("*Walton I*"). In *Walton I* the panel sustained the District Court on all other significant points, as well.

In a Petition for Rehearing and Suggestion for Rehearing En Banc, Walton insisted that *Walton I* was contrary to binding precedent on the central issue of transferability of *Winters* water rights to non-Indians. The same panel of the Ninth Circuit thereupon granted rehearing, withdrew its earlier opinion, and reversed the District Court's holding that *Winters* rights could not be conveyed to non-Indians. *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) (*Walton II*) (App. 35a). In *Walton II* the panel followed *United States v. Powers*, 305 U.S. 527 (1939), in which this Court held that:

> [W]hen allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners. 305 U.S. at 532; quoted in *Walton II*, at 50 (App. pp. 48a-49a).

Apparently concluding that "owners" referred to did not include non-Indians, the panel went on to say that it would determine:

> [W]hether non-Indian purchasers of allotted lands also obtain some portion of reserved waters. *Walton II*, at 50 (App. p. 49a).

The panel believed that this issue should, if possible, be decided based on Congressional intent as evidenced by the General Allotment Act of 1887, and explained the purpose of the General Allotment Act as follows:

> The General Allotment Act provided that land on reservations could be allotted for the exclusive use of individual Indians. . . . After holding allotted lands in trust for individual Indians for a 25-year trust period, the federal government could convey the land to the allottee in fee, "discharged of all charge or incumbrance whatsoever." 25 U.S.C. § 348.
>
> . . . .

> The General Allotment Act represented the shift in federal objectives from segregation of Indians on reservations to assimilation of them in non-Indian society. Its primary sponser, Senator Dawes, explained that "the quicker [the Indian] is mingled with the whites in every particular the better it will be." . . .
>
> The Act was designed to encourage Indians to become self-supporting citizens by making them landowners. . . . *Walton II*, at 49 (App. pp. 47a-48a).[1]

But despite its recognition that allotments, after the trust period, were to be held in fee "discharged of any charge or incumbrance whatsoever," the *Walton II* panel thought that Congress did not deal with the question of transferability of appurtenant water rights. The panel said:

> The [General Allotment] Act was passed over 20 years before the Supreme Court announced the implied-reservation doctrine in *Winters*. There is nothing to suggest Congress gave any consideration to the transferability of reserved water rights. To resolve this issue, we must determine what Congress would have intended had it considered it. *Walton II*, at 49 (App. p. 48a).

In *Walton II* the panel first discussed transferability from the point of view of the valuable vested property interest of the transferor Indian allottee. It said:

> The general rule is that termination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history. *See Bryan v. Itasca County*, 426 U.S. 373, 392-93 . . . (1975), *Mattz v. Arnett*, 412 U.S. 481, 504-05 . . . (1972). Upon careful consideration, we

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[1] The legislative history of the General Allotment Act indicates that it was the intent of Congress that Indians would learn to work and improve their land by the example of non-Indians settling on neighboring, former Indian land. 17 Cong. Rec. 190 (1886) (remarks of Senator Skinner).

conclude this principle supports the proposition that an Indian allottee may sell his right to reserved water.

The district court's holding that an Indian allottee may convey only a right to the water he or she has actually appropriated with a priority date of actual appropriation reduces the value of the allottee's right to reserved water. We think this type of restriction on transferability is a "diminution of Indian rights" that must be supported by a clear inference of Congressional intent.

By placing allotted lands in trust for 25 years, Congress evinced an intent to protect Indians by preventing transfer of those lands. But there is no basis for an inference that some restrictions survived beyond the trust period. Congress provided for extensions of the trust period, but directed that fee title be conveyed to the allottee when the period expired. *We think the fee included the appurtenant right to share in reserved waters, and see no basis for limiting the transferability of that right.*

This conclusion is supported by our decision in *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 342 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 . . . (1957). *Ahtanum* held that non-Indian purchasers of allotted lands are entitled to "participate ratably" with Indian allottees in the use of reserved water. . . . *Walton II*, at 50 (footnote omitted, emphasis added) (App. p. 50a).

The panel in *Walton II* then, without explanation, seemed to violate the principle it had just announced by a *dictum* to the effect that, unlike the vested water rights of the allottee, the same rights upon transfer to a non-Indian will be subject to loss for non-use. After noting that *Winters* water rights are not subject to diminution or loss through non-use during allottee ownership, the panel went on simply to declare:

> This characteristic [of retention despite non-use] is not applicable to the right acquired by a non-Indian purchaser. The non-Indian successor acquires a right

> to water being appropriated by the Indian allottee at the time title passes. The non-Indian also acquires a right, with a date-of-reservation priority date to water that he or she appropriates with reasonable diligence after the passage of title. If the full measure of the Indian's reserved water right is not acquired by this means and maintained by continued use, it is lost to the non-Indian successor.
>
> The full quantity of water available to the Indian allottee thus may be conveyed to the non-Indian purchaser. There is no diminution in the right the Indian may convey. We think Congress would have intended, however, that the non-Indian purchaser, under no competitive disability vis-a-vis other water users, may not retain the right to that quantity of water despite non-use. See *United States v. Adair*, 478 F. Supp. at 348-49 [D. Ore. 1979] *United States v. Hibner*, 27 F.2d at 912 [D. Idaho 1928]. *Walton II*, at 51 (App. pp. 51a-52a).

The *Walton II* panel also reversed the holding of the District Court that state prior appropriation certificates can validly issue as to excess waters within the Colville Reservation, holding instead, in accordance with the Ninth Circuit decision in *United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1938), that jurisdiction over water rights within the Reservation rests exclusively with the federal government. The panel in *Walton II* also withdrew its simple affirmance of the District Court's refusal to adjudicate *Winters* water rights to the Tribe for the express purpose of creating spawning grounds for the Lahontan Cutthroat Trout. In *Walton II* the panel ruled that the District Court coul dadejudicate to the Tribe water rights in the No Name hydrological system for use for the natural spawning of trout.

In a final footnote to the opinion in *Walton II*, the panel said:

> We are persuaded of the correctness of our analysis and conclusion concerning the transferability of the water rights involved in this litigation. Nevertheless, we recognize that reasonable minds hold conflicting

> views. State and federal courts, state and federal agencies responsible in water rights administration, and the numerous Indian tribes, allottees and their transferees, are plagued almost on a daily basis with the problems and uncertainties surrounding the issues discussed in this opinion. This case presents an appropriate vehicle for the Supreme Court to give guidance and stability to an area of great unrest and uncertainty in Western water and land law. A definitive resolution is overdue. The magnitude of the problem cannot be overstated. *Walton II*, at 54 n.18 (App. p. 57a).

Walton II remanded the case to the District Court "to determine the number of irrigable acres Walton owns, and the amount of water he appropriated with reasonable diligence in order to determine the extent of his right to share in reserved water." *Id.*

Certiorari was sought by the Tribe but this Court declined to review the *Walton II* holding that non-Indian purchasers succeed to the *Winters* water rights of Indian allottees. 454 U.S. 1092 (1982). The *Walton II* panel's *dictum* concerning the diligent appropriation and use test was not then ripe for review by this Court.

On remand, the District Judge followed the Ninth Circuit's instructions precisely and with great care. He found that Walton had exercised "not only reasonable, but expeditious" diligence in irrigating a minimum of 104 of the 170 irrigable acres owned by him. *Colville Confederated Tribes v. Walton*, No. 3421, mem. dec. at 5 (E.D. Wash. Aug. 31, 1983) ("*Walton remand*") (App. p. 21a). *The District Judge also found that during their tenures Walton's non-Indian predecessors all "exercised diligence in beneficially applying water for agricultural purposes to the maximum extent reasonably possible given prevailing economic and technological conditions."* *Walton remand*, at 7 (emphasis added) (App. p. 24a). The District Judge therefore held that Walton had a claim to 416 acre fee per year (4 x 104) to irrigate 104 acres, equal in priority with the Indians'

claim to 666.4 acre feet per year (166.6 x 4) to irrigate their 166.6 irrigable acres; since the sum of 416 and 666.4 exceeds 1000, the total acre feet per year available, the Judge abated Walton's and the Indians' claims ratably, producing 384 acre feet per year for Walton, and 616 acre feet per year for the Indians. *Walton remand*, at 8 (App. p. 26a).

The District Judge declined to rank the Tribal claim for a replacement fishery as on a par with irrigation requirements already referred to; accordingly, he did not allocate the 350 acre feet per year which the evidence showed could be required for spawning. Instead, noting that the Tribe is in fact irrigating only 107.2 of its 166.6 irrigable acres (and using only 428.8 acre feet of its allocation of 666.4), the District Judge held that the difference of 137.2 acre feet would be available for establishment of a replacement fishery.

On a second appeal, a panel of the Ninth Circuit reversed the District Judges' allocation to Walton of 384 acre feet per year, and ordered him to reduce Walton's allocation to an amount sufficient to irrigate only thirty acres (120 acre feet per year). *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985) (*Walton III*) (App. p. 1a). Even though Walton's non-Indian predecessors irrigated to the maximum extent reasonably possible under conditions prevailing before the advent of electric power and aluminum pipes, the *Walton III* panel found that, because irrigated acreage remained fairly constant for a period of 23 to 27 years, the record lacked "sufficient evidence that the non-Indian owners preceding Walton had the requisite *intent* to irrigate any additional acreage." *Walton III*, at 403, n.4 (emphasis supplied) (App. p. 10a). The panel thus held that essential water rights purchased from Indian allottees were forfeited for failure to satisfy an intent requirement not alluded to in *Walton II*; declined to infer intent based on consistent irrigation to the maximum extent reasonably possible,[2]

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[2] *Longmire v. Smith*, 26 Wash. 439, 67 P. 246 (1901).

and treated the economic and technological impossibility of irrigating more than about thirty acres as irrelevant to the matter of required intent. *Walton III*, at 403, n.4 (App. p. 10a).

Walton sought rehearing, and suggested rehearing en banc, on the grounds (1) that reasonable diligence is not converted to a lack thereof by the absence of an intent to do more than is reasonably possible, (2) that state law cases establish that a suspension of progress in increased irrigation will not support a finding of lack of diligence or intent if explained by reasonable impossibility,[3] and (3) that a remand was in any event necesasry since *Walton II* had not called for proof of intent in addition to, or as a part of, reasonable diligence.

As Circuit Judge Sneed said in his separate Concurrence to the order denying rehearing of *Walton III*:

> The combined effect of *Walton II*, as explicated by this case, [i.e.] *Walton III*, and *Adair* [4], is to have

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[3] *State ex rel. VanWinkle v. People's West Coast Hydro-Electric Corp.*, 129 Or. 475, 279 P. 583 (1929); *In re Owyhee River Water Rights*, 124 Or. 44, 259 P. 292 (1927).

[4] [Footnote not in original] In *United States v. Adair*, 723 F.2d 1394, 1417 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 3536 (1984), and later in *United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. July 10, 1984), other panels of the Ninth Circuit simply followed the *dictum* of *Walton II* on the matter of the reasonable diligence test. Neither the *Adair* nor the *Anderson* panel offered any rationale or reason for the rule. The District Court in *Adair*, 478 F. Supp. 336, 348-349 (D. Ore. 1979), had followed *United States v. Hibner*, 27 F.2d 909, 912 (D. Idaho 1928), in which the District Judge had said:

> The status of the [*Winters* doctrine] water right after it has passed to others by the Indians seems to be somewhat different from while such right is retained by the Indians, because the principle invoked by the courts for the protection of the Indian as long as he retains title to his lands does not prevail and apply to the white man, and the reason for so holding is that there was reserved unto the Indians the absolute right to own and use in their own way the water for their lands, while the white man, as soon as he becomes the owner of the Indian Lands, is subject to those general rules of law governing the

> made impossible the transfer by an Indian allottee to a non-Indian successor the full economic value of the allotment. There is a serious question whether this properly reflects Congressional intent. 758 F.2d 1324 (App. p. 59a).

Judge Sneed apparently felt bound by *Adair* and did not dissent. But he concluded his separate concurring opinion denying rehearing in *Walton III* as follows:

> Equal treatment of Indian allottees and non-Indian successors in interest to Indian allottees would better serve the interests of justice. 758 F.2d 1324 (App. p. 59a).

The *Walton III* panel also held that the District Judge erred on the *Walton remand* in treating the fishery requirement as secondary to irrigation. Accordingly, apparently without considering alternative Reservation water resources such as Omak Creek and one other creek (*see Walton remand* at 21, n.10) (App. pp. 22a-23a), the *Walton III* panel ruled that the Tribe is entitled to the full 666.4 acre feet for irrigation (despite the non-use of 137.2), plus the full 350 acre feet required to establish the replacement fishery, all from the already overcommitted No Name system. The result would be that total claims of 1336.4 acre feet (Walton's 120, the Indians 666.4 for irrigation, plus their 350 for the establishment of the replacement fishery), against available flow of only 1000 acre feet, would require an abatement

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appropriation and use of the public waters of the state, and would, as grantee of the Indian allotments, be entitled to a water right for the actual acreage that was under irrigation at the time title passed from the Indians, and such increased acreage as he might with reasonable diligence place under irrigation, which would give to him, under the doctrine of relation, the same priority as owned by the Indians; otherwise, the application of any other rule would permit such grantee for an indefinite period to reclaim the balance of his land and withhold the application of the water to a beneficial use, which is against the policy recognized in the development of arid lands.

of all claims to about 75% of their full amount. The result would be that Walton's claim would only realize about 90 acre feet (enough to irrigate only about 22.5 acres), and the Tribe would realize about 499 for irrigation (about 70 more than the approximately 429 actually used) and about 262 for the replacement fishery, or a total of about 761 compared to their total requirement for all potential uses of about 779.

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

The Ninth Circuit panel in *Walton III* has so far departed from the accepted and usual course of judicial proceedings, by imposing an implied reversion, right of reentry, or forfeiture of vested property diminishing the property rights of Indian allottees contrary to *Walton II*, or by imposing on successors to allottees a test so artrary and capricious in relation to the announced objective of requiring reasonable diligence, that exercise of this Court's powers of supervision are clearly called for, as contemplated by Rule 17.1(a) (clause three).

The *Walton III* panel of the Ninth Circuit has, in addition, erroneously decided important federal questions involving essential property rights of Indian allottees and their successors in interest throughout the West, which have not been, but ought to be settled by this Court, as contemplated by Rule 17.1(c) (clause one).

ARGUMENT

Contrary to the Ninth Circuit panel's view expressed in *Walton II*, the transferability of water rights appurtenant to Indian allotments is not left in doubt by the provisions of the General Allotment Act of 1887; it was therefore unnecessary and inappropriate for that panel to resort to speculation as to what Congress "would have intended."

The *Walton II* panel apparently concluded that the question of the transferability of reserved water rights was not dealt with by the express terms of the General

Allotment Act because the Act was passed 20 years before this Court, in *Winters v. United States*, 207 U.S. 564 (1908), affirmed the existence of such rights, and because the only mention of water rights in the Act was in Section 7, 25 U.S.C. 381, quoted *supra*, at p. 3. But Section 7 merely enables the Secretary of the Interior to enforce a just and equal distribution of water among Indian allottees, *see United States v. Powers*, 94 F.2d 783, 785 (9th Cir. 1983), *aff'd*, 305 U.S. 527 (1939); *Anderson v. Speer-Morgan Livestock Co.*, 79 P.2d 667, 669 (Mont. 1983), and proscribes acquisitions by riparian owners which would disturb such just and equal distribution as to others. This is perfectly consistent with, and may be said to have anticipated the holdings of this Court and others, that upon creation of Indian reservations sufficient waters thereon are reserved to irrigate irrigable reservation lands,[5] and that upon subsequent allotment to individual Indians pursuant to the General Allotment Act a portion of such reserved waters vests in each individual Indian allottee as an appurtenance to the irrigable acreage of his allotment.[6]

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[5] *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Powers*, 305 U.S. 527, 532 (1939); *Arizona v. California*, 373 U.S. 546 (1963); *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062, 2069 (1976); *United States v. McIntire*, 101 F.2d 650, 653-54 (9th Cir. 1938); *United States v. Alexander*, 131 F.2d 359 (9th Cir. 1942); *Scholder v. United States*, 428 F.2d 1123, 1126 (9th Cir. 1970).

[6] *United States v. Powers*, 305 U.S. 527, 532 (1939); *United States v. Preston*, 352 F.2d 352 (9th Cir. 1965). *Scholder v. United States*, 428 F.2d 1123, 1126 (9th Cir. 1970); *United States v. Adair*, 723 F.2d 1394, 1417 (9th Cir. 1984); *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984); *Anderson v. Speer-Morgan Livestock Co.*, 79 P.2d 667, 669 (Mont. 1938); In F. Cohen, U.S. Interior Department Handbook of Federal Indian Law, 1958 ed., at pp. 785-787, Professor Cohen said:

> "The Supreme Court in *U.S. v. Powers*, declared that under the doctrine of the *Winters* case, waters are reserved for the equal benefit of tribal members and that the Secretary of Interior is without power affirmatively to authorize the unjust and unequal distribution of water. It further declared that

In any case, the provisions of Section 5 of the Act expressly state the intent of Congress as to how the allottee holds his allotment upon termination of the initial trust period: namely, in fee simple absolute without any limitation of right whatever. Section 5 provides in pertinent part:

> That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in the case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever [.] 25 U.S.C. § 348.

An appurtenance to a fee conveys with the fee, unless there is an explicit reservation of some kind in the conveyance.[7] An appurtenance to land acquired with the

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when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential to cultivation passed to the owner of the allotted land, including both the allottees and those who took from them by conveyance or by purchase of land of deceased allottees at government sales.

The *Powers* case compels the view that the right to use water is a right appurtenant to the land within the reservation, and that unless excluded, it passes to each grantee and subsequent conveyance of the allotted land."

[7] *United States v. Powers*, 16 F. Supp. 155, *modified on other grounds and aff'd*, 94 F.2d 783 (9th Cir. 1938), *aff'd*, 305 U.S. 527 (1939); *Scholder v. United States*, 428 F.2d 1123, 1126 (9th Cir. 1970); *United States v. Adair*, 723 F.2d 1394, 1417 (9th Cir. 1984); *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984); *Anderson v. Speer-Morgan Livestock Co.*, 79 P.2d 667, 669 (Mont.

fee from the owner of the fee, is, like the land, held in fee. Accordingly, there can be no doubt that Congress intended that all appurtenances to allotted lands, including essential water rights conveyed to the allottee as appurtenances thereto, should, like the lands, be held by the allottee "in fee, discharged of all charge or incumbrance whatsoever." Lands and appurtenances held in fee, free of trust and of any charge or encumbrance, obviously can be conveyed in fee.

The *Walton II* holding—that reserved water rights appurtenant to Indian allotments are transferrable to non-Indians—was therefore required by Section 5 of the General Allotment Act, and need not have been based on speculation as to what policy Congress might have chosen. It follows that the nature of the transferrable reserved water rights is not for the Ninth Circuit, or even for this Court, to fashion or delimit according to its preference as to what Congress might have done. Congress in fact provided that the reserved water rights are to be held in fee by Indian allottees, and are transferrable, without any "charge or incumbrance whatsoever."

Accordingly, the reserved water rights transferred to Walton's non-Indian predecessors cannot be held to be less than the rights held by the grantor allottees. Since the rights held by the allottees were vested in fee, and were not subject to divestment upon a reversion, right of reentry, or forfeiture because of non-use, the rights conveyed to Walton's predecessors and to Walton cannot be held to be less in that they are subject to such divestment because of non-use.

1938). F. Cohen, *supra* n.2; III *American Law of Property* § 12.87 (A.J. Casner ed. 1952).

As the *Walton II* panel said:

> "We think the fee included the appurtenant right to share in reserved waters, and see no basis for limiting the transferability of the right." *Walton, II,* at 50 (App. p. 50a).

The *Walton II* panel may have recognized this, for its "reasonable diligence" test need not be read as a limitation on the interest passing to the non-Indian grantee, but could be read as referring to a consequence of ownership by non-Indians. The fact that non-Indian landowners, in contrast to Indians, are not presumed to be at any competitive disadvantage could possibly justify application of a general principle designed to reward diligence, and punish a lack thereof, in the development and continued beneficial application of a scarce resource. *See Walton II* (*supra* pp. 9-10), at 51 (App. p. 52a), and *United States v. Hibner*, *supra* note 3. But as has been shown, the test actually applied by *Walton III* was not a reasonable diligence test at all. If reasonable diligence were really all that was required of Walton's non-Indian predecessors, who "exercised diligence . . . to the maximum extent reasonably possible," they obviously would not have been held to have forfeited or otherwise lost their vested water rights. The *Walton III* panel's purported faulting of Walton's non-Indian predecessors for lack of *intent* to do more than was reasonably possible, likewise cannot be taken as a finding of fault or lack of diligence. The use-it-or-lose-it- rule of *Walton III* cannot in fact be said to be rationally related in any way to diligence or lack thereof, or to any policy based thereon. It is instead a rule that works a forfeiture or divestment based on circumstances beyond the control of the affected owners. Moreover, since under *Walton II* state prior appropriation law has no application, and the reserved water claims on the No Name system exceed the amount of flow, there cannot in law or in fact be any competition by or with Indians or non-Indians for water rights, and it is a senseless injustice to divest Walton's non-Indian predecessors, and hence Walton of his essential water rights, in the name of providing a retroactive incentive to non-existent, and legally precluded, competition.

The result is that, whether or not a real diligence test would amount to a diminution of property rights of the

grantor allottees, *Walton III* has, as a matter of law, delimited the property interest transferrable to non-Indians by Indian allottees by working a divestment for non-use irrespective of diligence. This is in law, if not in name, the very kind of diminishment of the interest transferrable by the Indian allottee which, as the Ninth Circuit held in *Walton II*, is unlawful absent the express authority of Congress. *See Bryan v. Itasca County*, 426 U.S. 373, 392-93 (1955); *Mattz v. Arnett*, 412 U.S. 481, 504-05 (1972). Because technology and changing economic circumstances have made irrigation feasible through the exercise of diligence (such as Walton's exemplatory diligence) on many Indian reservations and Indian allotments where formerly it was not feasible, the question raised by *Walton III*'s peculiar perversion of what is in name a "reasonable diligence" test is of broad significance and ought to be addressed by this Court.

Divestment upon non-use by the non-Indian successor, even though use was impossible through the exercise of reasonable diligence, should be deemed a restriction or tantamount to a restriction on the transferrable interest of the allottee, violative of the principle held controlling in *Walton II*. Furthermore, divestment of the non-Indian successors' vested property because of their failure or lack of intent to do more than was at the time reasonably possible bears no rational relation to, and is arbitrary and capricious when measured against, the announced governmental purpose of fostering or requiring reasonable diligence. If this Court does not strike this unfair and unjust ruling in the exercise of its powers of supervision over the decision of important federal questions, then grave due process and equal protection questions must be addressed. *See Shelley v. Kraemer*, 334 U.S. 1 (1948); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Carter v. Miller*, 434 U.S. 356 (1978) (*per curiam*).

CONCLUSION

The writ of certiorari should issue.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 83-4285

COLVILLE CONFEDERATED TRIBES,
Plaintiffs/Appellants,

v.

BOYD WALTON, JR., *et ux, et al.*,
Defendants/Appellees.

DC# CV 3421

[Filed Jan. 21, 1985]

Appeal from the United States District Court
for the Eastern District of Washington
Chief District Judge Robert J. McNichols, Presiding

[Argued and Submitted November 5, 1984]

OPINION

Before: WRIGHT, SNEED, and ALARCON, Circuit Judges.

WRIGHT, Circuit Judge:

This dispute involves respective rights of the Colville Confederated Tribes (Tribe), Indian allottees and Walton

to share in water from the No Name Creek Hydrological System, which was originally reserved for the Tribe under the *Winters* doctrine, when the Colville Reservation was created. *See Winters v. United States*, 207 U.S. 564, 576 (1908).

Walton and the Indian allottees seek water for irrigation. The Tribe seeks additional water to establish the Omak Lake Fishery as spawning grounds for the Lahonton Cutthroat Trout as a replacement for fishing grounds lost to development on the Columbia River. The Tribe currently pumps water from the aquifer into No Name Creek during spawning season.

The factual and legal background to this 14-year-old dispute is thoroughly reviewed in *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. Wash. 1978) (*Walton I*) and *Colville Confederated Tribes* v. *Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981) (*Walton II*). We note only the most salient facts.

FACTS:

All the former reservation land involved in this case passed into private ownership pursuant to the General Allotment Act of 1887. 24 Stat. 388. A row of seven allotments in the No Name Creek watershed was created in 1917. *Walton II*, 647 F.2d at 45. The United States holds allotments 892 to the north of Walton's property, and 901 and 903 to the south, in trust for the heirs of the original Indian allottees. The Tribe farms and irrigates these allotments under long-term leases. Allotment 526, which is also held in trust by the United States, is beneficially owned by the Tribe, but was properly excluded from the district court's allocation pursuant to the remand.[1]

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[1] Allotment number 526, the northernmost allotment, was excluded because water to irrigate it is potentially available from another source, thus water from the No Name System was not needed. *Walton II*, 647 F.2d at 49.

Walton owns allotments 525, 2371 and 894, which he purchased in 1948. These allotments originally passed out of the ownership of Indian allottees between 1921 and 1925.

No Name Creek is a spring-fed creek which originates on allotment 892 and flows through Walton's allotments and the Indians' southern allotments into Omak Lake, a saline lake with no outlet. The creek and an underground aquifer underlying the Indians' northern allotments and the northern tip of Walton's allotment, number 525, constitute the No Name Creek Hydrological System.

In *Walton II*, we held that the United States reserved sufficient water, when the Colville Reservation was created, to allow the irrigation of all practicably irrigable acreage on the reservation. 647 F.2d at 48. We held also that a ratable share of this water reserved for irrigation passed to Indian allottees. This ratable share could in turn be conveyed to a non-Indian purchaser. However, the non-Indian purchaser's share is subject to loss if not put to use. *Id.*

In addition to water for irrigation, we held that sufficient water was reserved to allow the establishment of the Omak Lake Fishery and permit natural spawning of the Lahonton Cutthroat Trout. *Id.* at 48. This quantity of water, unrelated to irrigation, was not affected by the allotment of reservation lands and passage of title out of the Indians' hands.

We remanded the case to the district court to calculate the respective rights of the Tribe, Walton, and the individual allottees. The district court, in an unreported opinion, awarded 384 acre feet per year[2] to Walton, 428.8 acre feet per year to the Indian allottees for irri-

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[2] An acre foot of water is that amount of water which will cover an acre of ground, one foot deep. It is equivalent to 43,560 cubic feet or 325,851 gallons. 1 *Waters and Water Rights* § 2.3 (R.E. Clark ed. 1967) (Clark).

gation, and 187.2 acre feet per year to the Tribe for the trout spawning program. The Tribe appealed.

ANALYSIS:

I. *Jurisdiction*

We have jurisdiction over this appeal under 28 U.S.C. § 1291. The district court's judgment and memorandum opinion were entered on August 31, 1983. On Monday, September 12, 1983, the Tribe served a copy of its motion for a new trial, Fed. R. Civ. P. 59(b), on Walton. The motion was filed the following day. An order was entered denying the motion on October 18, and the Tribe filed a notice of appeal on November 17, 1983.

The motion was served within the 10 day period required by Rule 59(b) and filed the following day and it was timely. *See Clipper Exxpress v. Rocky Mountain Motor Tariff*, 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983). The time for filing a Notice of Appeal was tolled, Fed. R. App. P. 4(a)(4), and the Notice of Appeal was timely filed.

II. *Law Applied*

Reserved rights are "federal water rights" and "are not dependent upon state law or state procedures." *Cappaert v. United States*, 426 U.S. 128, 145 (1976); *see also United States v. Adair*, 723 F.2d 1394, 1411 n.19 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 3536 (1984). It is appropriate to look to state law for guidance, *see Colorado v. New Mexico*, 459 U.S. 176, 184 (1982) (prior appropriation "guiding principle" for equitable apportionment between two prior appropriate states), although the "volume and scope of particular reserved rights . . . [remain] federal questions." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976) (quoting *United States v. District Court for Eagle County*, 401 U.S. 520, 526 (1971)). This dis-

pute involves relative shares of Colville's reserved waters, and is governed by federal law. We look to state law only for guidance.

III. *Walton's Allocation*

The extent to which Walton succeeded to a share of the water reserved for irrigation when the Colville Reservation was created is determined by reference to the criteria set forth in *Walton II*, 647 F.2d at 51. On remand the district court "[was] without power to do anything . . . contrary to either the letter or spirit of the mandate *construed in the light of the opinion of this court deciding the case.*" *Firth v. United States*, 554 F.2d 990, 994 n.3 (9th Cir. 1977), quoting *Thornton v. Carter*, 109 F.2d 316, 319-20 (8th Cir. 1940) (emphasis added); *see also In re Beverly Hills Bancorp*, No. 83-6557, slip op. at 5232-33 (9th Cir. Dec. 4, 1984). This is true even if the mandate was in error. *Firth*, 554 F.2d at 994.

A. *Irrigable Acreage*

An Indian allottee's share of water reserved for purposes of irrigation is limited by the relationship between the number of irrigable acres owned and the number of irrigable acres contained within the reservation. For example, an allottee who owns ten percent of the total number of irrigable acres within a reservation, is entitled to ten percent of the water reserved for irrigation purposes when the reservation was created. This in turn creates an upper limit on the share that may be conveyed to a non-Indian purchaser. *Walton II*, 647 F.2d at 51.

The district court found that Walton owned 170 irrigable acres. This is a finding of fact which we upheld unless clearly erroneous. *United States v. Timberland Paving & Construction Co.*, 745 F.2d 595, 598 (9th Cir. 1984). A finding of fact is clearly erroneous if a reviewing court is "left with the definite and firm conviction

that a mistake has been committed." *Id.* (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The Tribe argues that almost all of Walton's land is waterlogged and not irrigable.[3] We need not determine whether Walton owns 170 acres of irrigable land. As we discuss more fully below, we conclude that Walton's predecessors exercised reasonable diligence in irrigating only 30 acres. If Walton owns at least 30 irrigable acres, irrigable acreage is no longer a limiting factor.

Walton's property beyond question contains at least 30 irrigable acres. Wilson W. Walton (Walton, Sr.) and W.B. Walton (Walton, Jr.) both testified they successfully farmed and irrigated 104-155 acres. Reporter's Transcript, Aug. 9, 1982 (testimony of Walton, Sr.) and May 5, 1982 (testimony of Walton, Jr.). The Waltons' testimony was supported by that of Al Blomdahl, former Chief Soil Conservation Officer for the Okanogan Office of the United States Department of Agriculture Soil Conservation Service, who testified that Wilson Walton was named Regional Conservation Farmer of the Year in the early 1960's. Reporter's Transcript, May 5, 1982, p. 217.

B. *Reasonable Diligence*

In *Walton II*, 647 F.2d at 51, we said:

> On remand [the district court] will need to determine the number of irrigable acres Walton owns and the amount of water he appropriated with reasonable diligence in order to determine the extent of his right to share in reserved water.

The district court interpreted this to mean that Walton's diligence in applying water beneficially was the determinative factor in calculating his share of the reserved

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[3] The Tribe refers to a condition caused by a granitic lip which borders the south of Walton's property, resulting in the saturation of a portion of Walton's property directly uphill from the lip.

waters. The district court found that "Walton exercised reasonable diligence in irrigating a minimum of 104 acres," and calculated his allocation accordingly. Memo. Dec. at 5. The court then made alternative findings as to the diligence of the preceding owners of the property dating back to the immediate grantees of the original Indian allottees.

1. *Scope of the Mandate*

In *Walton II*, we established the criteria governing the transfer of reserved water rights from an Indian allottee to a non-Indian purchaser. Our mandate must be "construed in light of [our] opinion." *Firth*, 554 F.2d at 994 n.3. In *Walton II* we said:

> The non-Indian successor acquires a right to water being appropriated by the Indian allottee at the time title passes. The non-Indian also acquires a right, with a date-of-reservation priority date, to water that he or she appropriates with reasonable diligence after the passage of title. If the full measure of the Indian's reserved water right is not acquired by this means and maintained by continued use, it is lost to the non-Indian successor.

Walton II, 647 F.2d at 51.

A careful reading leaves no doubt that the immediate grantee of the original allottee must exercise due diligence to perfect his or her inchoate right to the allottee's ratable share of reserved waters. This interpretation is supported by our reference to *Walton II* in subsequent cases. *See, e.g., United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984) ("use it or lose it"); *United States v. Adair*, 723 F.2d 1394, 1417 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 3536 (1984). Once perfected, the water right must be "maintained by continued use [or] it is lost." *Walton II*, 647 F.2d at 51.

The district court on remand was to "calculate the respective rights of the parties." *Id.* at 53. Calculating Walton's share required an investigation into the diligence with which the immediate grantee from the Indian allottees appropriated water, and the extent to which successor grantees, up to and including Walton, continued to use the water thus appropriated. Otherwise, any remote purchaser could appropriate enough water to irrigate all irrigable acreage with a priority date as of the creation of the Reservation. The reasonable diligence requirement of *Walton II* would be meaningless.

2. *Appropriation*

Walton's share of the Colvilles' reserved water is limited to that amount appropriated "with reasonable diligence after the passage of title" from the original Indian allottees (or their heirs), and "maintained by continued use" by each subsequent successor, including Walton. *Id.* at 51.

Under the doctrine of "prior appropriation", (followed by most western states, including Washington, *see* Morris, *Washington Water Rights—A Sketch*, 31 Wash. L. Rev. 243, 252-260 (1956)), "one acquires a right to water by diverting it from its natural source and applying it to some beneficial use." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 805 (1976). To perfect an "appropriation," one must intend to appropriate a quantity of water, and diligently put it to a beneficial use. *See United States v. Big Bend Transit Co.*, 42 F. Supp. 459 (E.D. Wash. 1941) and cases cited therein interpreting Washington law.

If diligently applied, the priority date of the water right relates back to the initial diversion. *See, e.g., Longmire v. Smith*, 26 Wash. 439, 448, 67 P. 246, 249 (1901), 5 *Clark, supra*, § 409.3 (1972). The tests developed to determine whether or not an appropriator has been sufficiently diligent in applying water to a beneficial use to

justify relating the priority date back to the initial diversion are appropriate to determine how much water Walton's predecessors appropriated with reasonable diligence, after the passage of title.

3. *Intent Due Diligence*

An initial diversion of at least some water is an important indication of intent. *See* Clark, *supra*, § 409.2. When water is diverted for irrigation purposes, and the amount continuously and gradually increased, an intent to appropriate the quantity eventually used may logically be inferred. *See, e.g., In Re Waters of Doan Creek*, 125 Wash. 14, 25, 215 P. 343, 347 (1923), *In Re Water Rights in Alpowa Creek*, 129 Wash. 9, 224 P. 29 (1924). This could include enough water to irrigate all irrigable acres. *See Doan Creek*, 125 Wash. at 25, 215 P. at 347 (dicta). Thus, intent and due diligence are necessarily interrelated.

The district court found that the owners between the Indian allottees and Walton exercised "diligence in beneficially applying water for agricultural purposes to the maximum extent reasonably possible given prevailing economic and technological conditions." Mem. Dec. at 7.

The court apparently inferred that these owners intended to appropriate enough water to irrigate at least 104 acres, as soon as technologically feasible. We find this conclusion unsupported by the record.

The amount of land irrigated remained fairly constant, throughout the 23-27 year period following purchase by the Whams, the first non-Indian purchasers. Walton cites *In Re Alpowa Creek*, for the proposition that due diligence is determined in light of the attendant circumstances. However, in *Alpowa*, "the amount of . . . irrigation . . . gradually but surely increased." 224 P. at 31. *See also Offield v. Ish*, 21 Wash. 277, 57 P. 809, 810 (1899) (amount of acreage steadily increased). In *Doan*

Creek, the court refused to grant water rights to the full 125 acres under irrigation because irrigation grew steadily to 60-70 acres but remained constant at that level throughout the 1890's, limiting the right to 60 acres.

Walton argues that each preceding owner has farmed the water-saturated or subirrigated portion of his allotments, near the granitic lip. This, he urges, demonstrates reasonable diligence for purposes of perfecting a reserved right to water for irrigating other areas of his land.

We find his argument unpersuasive. The record indicates that this same acreage is subirrigated today. *See, e.g.*, Reporter's Transcript, May 7, 1982, p. 612 (testimony of Walton, Sr). Thus, assuming arguendo that the subirrigated acreage may give rise to an entitlement, it is being satisfied by the present subirrigation. To award additional water on this basis would result in a double allocation.

We are unable to infer an intent to appropriate an increasing amount of water from over two decades of relatively static irrigation practices.[4] Walton's share of the reserved water is thus limited to the amount utilized for irrigation throughout this period.

The district court found that the original non-Indian purchasers, the Whams, "irrigated about 30 acres employing gravity flow rill method as well as a small gasoline powered pump," and that they continued to irrigate the same amount of land until Walton bought the land in 1948. Mem. Dec. at 2-3.

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[4] The district court considered the political and economic conditions in the United States during this period, (e.g., The Great Depression, World War II), and the effect of new technology, (*e.g.*, the advent of aluminum pipe). We do not reach the issue whether the court properly considered these circumstances. We find the record lacking sufficient evidence that the non-Indian owners preceding Walton had the requisite intent to irrigate any additional acreage.

There is evidence that the Whams, the first non-Indian purchasers of Allotments Nos. 2372, 894 and 525, in 1921, 1923 and 1925 respectively, made an initial diversion of some quantity of water within a reasonable time after passage of title. Reporter's Transcript, May 5, 1982, p. 180 (testimony of Carol Wham Johnson). Witnesses testified that portions of the property were irrigated throughout the period leading up to the purchase by Walton. *E.g.*, Reporter's Transcript, May 5, 1982, pp. 136-138 (testimony of Mr. Hampson), pp. 177-184 (testimony of Mrs. Wham Johnson).

There may be periods about which the evidence concerning the acreage actually irrigated is sketchy or conflicting. However, absolute certainty is an impossibility when we are dealing with witnesses' attempts to remember events of 30 to 40 years ago.

We affirm the trial court's finding that sufficient water to irrigate 30 acres was appropriated with reasonable diligence by the original non-Indian purchasers and continually used by each subsequent owner, including Walton. Walton's right to this amount of water has a priority date as of the establishment of the Reservation.

4. *Beneficial Use*

"Water duty" is the "major conceptual tool for implementing beneficial use" in western water law. *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (9th Cir.), *cert. denied*, 104 S.Ct. 193 (1983) "It is that measure of water, which, by careful management and use, without wastage, is reasonably required to be applied to any given tract of land . . . to produce therefrom a maximum amount of such crops as ordinarily are grown thereon." *Id.* (quoting *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 129 Colo. 575, 584-85, 272 P. 557, 564 (1954)).

The district court utilized a water duty of four acre feet per year to quantify Walton's beneficial use of

water. This figure was adopted from *Walton I*, 460 F. Supp. at 1330, where it was applied to the land of the other allottees, based on testimony ranging from "4.8 acre feet to 3.6 acre feet" and covering property throughout the Okanogan Valley and the No Name Creek Basin.

The Tribe challenges its application to Walton's property because of the ground saturation caused by the granitic lip that borders the south of Walton's property. The nature of Walton's land was hotly contested. The trial judge adopted four acre feet per year as the "water duty" after considering all the evidence. After a careful review of the record, we cannot say this is clearly erroneous. *Cf. Alpine Land*, 697 F.2d at 851 (court upheld factual determination of water duty based on controverted expert testimony).

IV. *Indian Allottees*

The district court found that the Indian allottees owned 166.6 irrigable acres. Utilizing a water duty of four acre feet per year, 666.4 acre feet per year is their share of the reserved waters. However, the district court awarded only 428.8 acre feet per year because the allottees, through leases to the Tribe, were irrigating only 107.2 acres. Its application of a legal standard, deduced from *Walton II*, to essentially undisputed facts is reviewable de novo. *See In Re J.A. Thompson & Sons, Inc.*, 665 F.2d 941, 951 (9th Cir. 1982).

Reducing the Indian allottees' share for non-use is in direct conflict with *Walton II*, 647 F.2d at 51. The court should have allocated the full 666.4 acre feet per year to the Indian allottees.

V. *Omak Lake Fishery*

The court accepted the figures presented by Dr. Koch, *see* Mem. Dec. at 12, which translated into 350 acre feet per year for the needs of the Tribal Fishery. *See* Re-

porter's Transcript, May 7, 1982 at p. 587. However, the court allocated only 187.2 acre feet per year to the fishery. To reach this figure the court added Walton's allocation (384 acre feet per year)[5] to the Indian allottees' allocation (428.8 acre feet per year) and arrived at 812.8 acre feet per year as the amount in use. Subtracting this from the estimated amount available in the No Name Hydrological System, 1,000 acre feet per year, the court arrived at 187.2 acre feet per year. Th eresultant 187.2 acre feet per year was characterized as "available for other uses," Mem. Dec. at 9, and allocated to the Tribal fishery.

Walton II is clear. The Tribe has a reserved right "to sufficient water to permit natural spawning of the trout." *Walton II*, 647 F.2d at 48, and the Indian allottees have a right to share in the reserved water, based on the irrigable acreage owned, without any reduction for non-use. *Id.* at 51.

The district court was obligated to carry out the mandate of *Walton II*, "whether correct or in error." *Firth*, 554 F.2d at 994. *See also Stevens v. F/V Bonnie Doon*, 731 F.2d 1433, 1435 (9th Cir. 1984) (mandate controlling as to all matters within its compass). In *Walton II*, we specifically addressed the potential inequity of "open-ended water rights," but said quantification, not limitation, was the answer. *Walton II*, 647 F.2d at 48.

We held that "the purposes for which the reservation was created governed the quantification of reserved wa-

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[5] The district court calculated Walton's share by adding 416 acre feet per year (four acre feet per year x 104 acres), a figure representing his full entitlement, to the Indian allottees' full entitlement, 666.4 acre feet per year (166.6 acres x four acre feet per year). Since the resultant figure, 1082.4 acre feet per year, was greater than the estimated amount available, 1,000 acre feet per year, each share was proportionately reduced. Walton's 384 acre feet per year was his share after the reduction. The Indian allottees' reduction apparently played no further role in the calculation of their final allocation.

ter, but not the use of such water." *Id.* at 48. As support for this proposition, we quoted the Special Master in *Arizona v. California*, 373 U.S. 546 (1963), who said ". . . *the decree* [establishing a reserved water right] *establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow.*" Report from Simon H. Rifkind, Special Master, to the Supreme Court 265-66 (December 5, 1960) (emphasis added).

The district court treated the italicized phrase as a further hurdle which the Tribe needed to clear before becoming entitled to an allocation of reserved water for the Omak Fishery. It held that the validity of an allocation to the fishery depended on the existence of "relevant law" in addition to our mandate in *Walton II* which would "allow the Tribe to dispossess its members, or other persons succeeding to the vested rights of those members, of an important property right." Mem. Dec. at 13. This is incorrect.

The phrase, read in context, refers only to potential limitations on the utilization of water once rights have been quantified and decreed. It confirms what common sense indicates. A tribe's freedom to use reserved water for an alternative purpose remains subject to any otherwise applicable legal restraint.

The district court feared that the Tribe, by utilizing its *Winters* rights for the Omak Fishery, would dilute the water rights of the Indian allottees and their successors (*e.g.*, Walton). This merely reflects the tension between the doctrines of prior appropriation and Indian reserved rights. Where reserved rights are properly implied, they arise without regard to equities that may favor competing water users. *See Cappaert v. United States*, 426 U.S. 128, 138-39 (1976). Where, as here, all parties derive their rights and concomitant priority dates from reserved rights, and there is an insufficient water

supply, the result is mandated by *Walton II*: "the amount available to each claimant should be reduced proportionately." *Walton II*, 647 F.2d at 51. The position of the parties is analogous to that of any appropriators with the same priority date, faced with a water shortage.

The Tribe is entitled to its full allocation, 350 acre feet per year, subject to any pro rata adjustment necessitated by a lack of available water.

CONCLUSION:

We have considered the Tribe's objections to the treatment of the surface and ground waters of No Name Creek Basin as one hydrological unit, and find them without merit.

We reject also the Tribe's challenge to the use of 1,000 acre feet per year as an estimate of the water available. If this figur is inaccurate, each party's allocation may be adjusted proportionately.

On remand, the district court will allocate the reserved water among the parties, in accord with our opinion: 120 acre feet per year to Walton; 666.4 to the Indian allottees; and 350 to the Tribe's fishery. Since all parties have a priority date as of the creation of the Reservation, each should bear a proportionate share of any adjustment required by shortages of water.

Reversed and remanded. The parties will bear their own costs on this appeal.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 3421

COLVILLE CONFEDERATED TRIBES,
Plaintiff,

—VS—

BOYD WALTON, JR., *et ux, et al.*,
Defendants,

STATE OF WASHINGTON,
Defendant/Intervenor,

No. 3831

UNITED STATES OF AMERICA,
Plaintiff,

—VS—

WILLIAM BOYD WALTON, *et ux, et al*, and
THE STATE OF WASHINGTON,
Defendants.

[Filed Aug. 31, 1983]

MEMORANDUM DECISION

The history underlying this action is set forth in *Colville Confederated Tribes v. Walton (Walton I)*, 460 F. Supp. 1320 (E.D. Wash. 1978), *modified and remanded*, 647 F.2d 42 *(Walton II)*, (9th Cir., *cert. denied*, 454

U.S. 1092 (1981). On remand, this court is faced with resolution of two major issues. The first is predominately one of fact:

> On remand, [the court] will need to determine the number of irrigable acres Walton owns, and the amount of water he appropriated with reasonable diligence in order to determine the extent of his right to share in reserved water.

647 F.2d at 51.

The second is somewhat more fraught with pure legal overtones which, most observers would agree, tend toward the esoteric.[1] Once having ascertained the amount of irrigable acreage held by defendant and the quantity of water appropriated, it will then be necessary to "calculate the respective rights of the parties," bearing in mind the Tribe's implied reservation of water for maintenance of its fishery. 647 F.2d at 48 & 53.

During the course of the most recent hearings, credible testimony was presented in support of the following findings.[2] Walton's lands passed out of Indian ownership

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[1] Rarely has an appellate court more strongly urged review by the Supreme Court:

> We are persuaded of the correctness of our analysis and conclusion concerning the transferability of the water rights involved in this litigation. Nevertheless, we recognize that reasonable minds hold conflicting views. State and federal courts, state and federal agencies responsible in water rights administration, and the numerous Indian tribes, allottees and their transferees, are plagued almost on a daily basis with the problems and uncertainties surrounding the issues discussed in this opinion. This case presents an appropriate vehicle for the Supreme Court to give guidance and stability to an area of great unrest and uncertainty in Western water and land law. A definitive resolution is overdue. The magnitude of the problem cannot be overstated.

647 F.2d at 54 n.18.

[2] Rule 52(a), Fed. R. Civ. It should be noted at the outset that most of the witnesses appearing in the recent round of hearings

between 1921 and 1925. More specifically, the Whams purchased allotment 2371 in 1921; 894 in 1923; and 525 in 1925. *See also*, 460 F. Supp. at 1334, stipulated fact # 22. To the north of these allotments was 892, owned by Joe Peters, a member of the Colville Tribe. See area map, *id* at 1336. To the south lay 901 and 903 owned by the Timentwa family, also members of the Tribe, who irrigated approximately 30 acres utilizing water from No Name Creek. The Whams ran some 100 head of cattle, and in addition to water diverted for stock, also irrigated about 30 acres employing gravity flow rill method as well as a small gasoline-powered pump.[3] Additionally, because of the unique geological characteristics of this area, allotments 2371 and 894 were sub-irrigated at that time and required no application of water.[4] Sub-irrigated acreage was estimated at about 40. Throughout the 20's and 30's, well prior to the advent of electrical power being brought in, this state of affairs remained more or less stable, with the Whams thus cultivating a total of approximately 70 acres.[5]

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were both candid and forthright in presenting testimony. Two notable exceptions were Mr. Clark and Mr. Kaczmarek, whose partisanship shone through. Their purported ability to identify irrigated lands from ancient aerial photographs did not survive the rigors of cross-examination and the court places little weight on their opinions.

[3] Estimates by persons familiar with this area varied from a low of 17 to a high of 40. Selection of the figure 30 is not merely an averaging, but rather is based upon what I consider the most focused and trustworthy recollections.

[4] Bordering the south of the Walton property is an impermeable granitic lip which tends to maintain ground water at a high level in immediately adjacent areas. This geologic fact tends to support witness testimony that sixty years ago, these areas were sub-irrigated.

[5] These were happier times. Mary Ann Timentwa Sampson, who lived on 901 and 903 as a young girl, offered the following:

Walton acquired 2371, 894 and 525 in July of 1948. The following month he applied to the state for a permit to divert 1.0 c.f.s. for irrigation of 75 acres.[6] The next year, after successful negotiations and the commitment of substantial capital, Walton was able to bring electricity into the valley for the first time.

The availability of electricity led to the installation of two five-horsepower pumps in the creek which, together with the use of newly available aluminum pipe, allowed Walton to engage in considerably more sprinkler irrigation as opposed to the less efficient rill method. During the period of 1949 and 1950, Walton had a minimum

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Q. And in addition to [the Whams] leasing your mother's property, they were farming some of their own property, were they not?

A. Yes, they were.

Q. And as I understand it, from time to time they did assist you in tilling the land, or farming the land, or in developing the irrigation.

A. Well, we were neighbors, and if they needed help, we went and helped them, and that was the same with Joe Peter. We were neighbors, the three of us, and we helped one another.

The tribe makes much of the admitted fact that the Whams were not piggish about taking only their fair share of the natural flow of No Name Creek, always allowing a sufficient amount to flow to the south for the benefit of their neighbors on 901 and 903. It is contended that this is incontrovertible proof that the Whams deliberately failed to exercise due diligence in fully developing their potentially irrigable acreage and that this deliberate by-pass forever freezes the amount of irrigable acreage at the level under cultivation during the time frame the Whams were in possession. This is utter nonsense. That Wham, Peters and Timentwa had the prescience to foresee the Circuit's doctrine of ratable reduction is much to their credit.

[6] The state ultimately issued a Certificate of Water Right in 1950 for 1.0 c.f.s. for the irrigation of sixty-five acres. This water right was declared a nullity in *Walton II*, 647 F.2d at 52.

of 104 acres under irrigation.[7] At that point in time, Wilson Walton believed that he potentially had some 155 acres susceptible to irrigation and intended to eventually develop a system capable of delivering sufficient water to accomplish that end. Thereafter, a series of surveys were completed by the Soil Conservation Service and the Bureau of Indian Affairs which established that the Walton land contained at least 170 acres of potentially irrigable cropland.

Amount of Water Appropriated:

A two-step inquiry, it is first necessary to determine the amount appropriated, and then ascertain to what extent that quantity was appropriated with reasonable diligence. Prior to culmination of the instant conflict, diversion was not accurately recorded. Thus, there is no way of ascertaining with any degree of precision the exact amount of water beneficially applied. Having quantified the acreage, however, it is a simple matter to work backwards.

Judge Neill determined that reasonable irrigation practice required the application of four acre feet per year. No one disputes that Walton obtains a respectable yield from his farming efforts, and thus it is a fair inference that he is applying, and has applied, at least that amount of water minimally necessary for effective crop propaga-

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[7] This is the figure adopted by the Circuit as the amount "currently irrigated" by Walton. 647 F.2d at 45. It also closely approximates the figures found in Judge Neill's opinion. 460 F. Supp. 1324; *see also id.* at 1334, stipulated fact #20. That does not supply the answer to what Walton may have been irrigating shortly after acquiring the land, bringing in electricity, and modernizing his irrigation equipment. Had this court been instructed to try the entire matter de novo, then I would have to consider the possibility that substantial evidence exists to fix the quantity of acreage at a significantly higher figure. For reasons set forth in note 10, *infra*, however, I am inclined to view the 104 acre figure as the law of the case insofar as the question of due diligence is concerned.

tion.[8] The answer to the first prong of the question is therefore equational in nature. Walton has 170 irrigable acres, and has consistently irrigated at least 104 of these. Each acre requires the application of four feet per year for sustained productivity. Walton has demonstrated that sustained productivity. Ergo, he has beneficially applied 416 acre feet per year.

As far as Walton's diligence is concerned, where an individal, within sixteen months of purchasing land, demonstrates an intention to divert by applying for a permit, expends considerable sums to bring in electricity, designs a delivery system utilizing the most modern and efficient equipment, undertakes a comprehensive inventory of the suitability of his acreage for crop production by eliciting the aid of the Soil Conservation Service, and then proceeds to actually apply water beneficially, the only conclusion that can be drawn is that diligence is not only reasonable, but expeditious. I have no difficulty finding that Walton exercised reasonable diligence in irrigating a minimum of 104 acres.[9]

The Tribe raises the contention, however, that it is a legal impossibility for Walton to establish due diligence unless it can be demonstrated that such diligence was exercised by the original allottee or his immediate grantee, and thereafter preserved by each subsequent non-Indian owner. The argument proceeds as follows. Only the original allottee had a vested right in reserved waters. He could convey that vested, but inchoate, right to his immediate grantee, but in order to perfect that right the grantee himself must exercise reasonable diligence, and that grantee could reconvey that perfected right to a

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[8] This analysis has the salutory effect of establishing a ceiling on Walton's claim. That is to say, even if, as asserted by the Tribe, Walton has appropriated more water than could be beneficially applied, he will be given "credit" for having appropriated only that amount which would be necessary to efficient farming efforts.

subsequent non-Indian purchaser only to the extent of its perfection by appropriation with due diligence. Stated another way, if the immediate grantee did not exercise due diligence, the inchoate right was lost forever and could not thereafter be revived by a subsequent grantee because that later purchaser would have no inchoate right capable of being perfected.

The argument is not without some appeal, and indeed is alluded to in *Walton II*. In this case, however, the Circuit is abundantly clear in its mandate: this court is to determine the "amount of water *he* [Walton] appropriated with reasonable diligence." 647 F.2d at 51 (emphasis supplied). There is no mention whatever of the weight to be accorded performance or non-performance of intervening owners, and yet it is apparent that the Court was well aware that the land had passed out of Indian ownership many years and several grantors removed from Walton's acquisition in 1948.[10] It may well

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[9] As testimony established during trial, any year-to-year deviation can be explained with reference to such universal farming practices as crop rotation, emphasizing one crop over another in response to market conditions, and allowing land to stand fallow as a conservation practice.

[10] An extremely troubling aspect of this case lies in the uncomfortable feeling that not all "facts" are. For example, with respect to the fishery issue, Judge Neill found that "No Name Creek is the only fresh water source into the lake." 460 F. Supp. at 1325. In fact, the Tribe's own expert, who is intimately familiar with the fishery operation, testified before this court that at least two other creeks would have been equally suitable for use as a spawning ground. Perhaps far more critically, the trial court found that "[t]he allotments now owned by the Waltons passed from Indian ownership in 1942." *Id.* at 1324. In fact, as all parties freely agree, Hettie Justice Wham was not an Indian. See *id.* at 1334, Appendix 22(a) and (c). The allotments at issue thus passed out of Indian ownership in 1921-25.

It would be less than honest to pass on the questions raised without disclosing the above. On the other hand, the mandate does not contemplate this court now retrying the matter in its en-

be areas such as this which prompted the Circuit to urge further review. See note 1 *supra*. In any event, this Court is unable to conclude that the Circuit would include in its mandate a useless issue.

Alternatively, if the performance of intervening owners is relevant, there is ample evidence to conclude that Walton's land was in production throughout most of the period from 1921-25 when it passed out of Indian ownership until 1948 when Walton purchased it. Obviously, it is impossible to quantify the exact acreage in production during the relevant time frame. Those who testified were asked to turn their minds back fifty years and more. Some were asked to recall childhood memories. That the amount of land subject to irrigation cannot now be precisely ascertained is certain, but that the land was in fact in crops, and was in fact irrigated to at least some extent by all of the intervening owners throughout most of the time span at issue, is equally certain.

Walton argues that certain practical considerations must necessarily play a role in determining what is reaonable where diligence in appropriate water is involved. The court is asked to bear in mind that there was a depression throughout the 1930's, and that a major war followed; that irrigation equipment was primitive during

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tirety. Perhaps the dilemma can be laid to rest by making the reasonable assumptions that: (1) the parties had a full and fair opportunity to litigate all factual issues in this action in front of Judge Neill; (2) the parties had full opportunity to appeal those findings of fact not supported by the evidence; and (3) the Circuit gave appropriate attention to all challenges of the fact-finding process and chose to accept the facts as found by the trial court.

With these assumptions in place, perhaps it would be presumptuous for this court to now question the validity of some very basic, and arguably dispositive, factual predicates. The facts found by the trial court and relied upon by the Circuit will thus be considered to constitute the law of the case, and this court will refrain from original fact-finding except insofar as may be necessary to fulfill the mandate.

the 30's and 40's and that irrigation was thus labor-intensive; that aluminum pipe had not yet been perfected; that electricity was non-existent until Walton financed the first powerline into the area in 1949.[11] In short, defendant asserts that what is "reasonable" is ascertainable with reference to what is practical, and that the economic realities of life and the then-existing state of the art in agricultural practice cannot be wholly divorced from a "reasonableness" determination. I am persuaded that this position has merit, and that each of the intervening owners exercised diligence in beneficially applying water for agricultural purposes to the maximum extent reasonably possible given prevailing economic and technological conditions. *United States v. Big Bend Transit Co.*, 42 F. Supp. 459, 468-69 (E.D. Wash. 1941) and authorities cited therein.

Allocation:

Having quantified the number of irrigable acres owned by Walton and the amount of water he appropriated with reasonable diligence, the specific mandate enunciated in *Walton II*, 647 F.2d at 51, has been satisfied. The more general mandate to "calculate the respective rights of the parties," *id.* at 53, is a more difficult task. If Walton holds 170 irrigable acres, and has diligently made beneficial application of water from No Name Creek on 104 of those, and if Tribal members hold 166.6 irrigable acres and are currently irrigating 107.2 of those,[12] and if the

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[11] The argument is buttressed in the record by testimony from Mr. Apple, who was a pioneer in installing irrigation systems in that part of the country.

[12] 460 F. Supp. at 1330. This figure does not include allotment 526 which is beneficially owned by the Tribe. *Id.*, approved in *Walton II*, 647 F.2d at 49. This may be an appropriate point at which to clarify language contained in an earlier order of this court where it was noted that although 526 is not entitled to participate in the waters of No Name Creek, either by means of surface diversion or drawing from the qualifier, the Tribe could

respective rights to share in reserved waters are equal in priority, and if any shortfall in available water must be borne ratably, then certain conclusions can be reached with some measure of confidence.

Even assuming that the law of the case doctrine would not be binding on this court's factual determinations with respect to those quantifications developed by Judge Neill, nothing presented in evidence would give cause to modify those findings except as mentioned in note 10, *supra*. In an average year, 1,000 acre feet is available from No Name Creek.[13] Average duty is four acre feet per year. *Walton I*, 460 F. Supp. at 1330. Ignoring for the moment the fish hatchery issue, the respective rights of the parties may therefore be tentatively quantified thusly:

Walton	104 acres at 4 acre feet	416 acre feet
Other allottees	166.6 acres at 4 acre feet	666.4 acre feet
		1,082.4 acre feet

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nevertheless continue to irrigate this allotment provided that whatever was applied would be subtracted from the share which would otherwise be available for 892, 901 and 903. For reasons addressed *infra*, this does *not* mean that the Tribe may unilaterally divest individual allottees or their successors of their vested shares. It merely means that the Tribe, as lessee of the individual allotments, could place water under its control by virtue of those leases wherever it might deem appropriate.

[13] 460 F. Supp. at 1330. Expert testimony at trial ranged from a low estimate of 550 acre feet to a high of 1,300 available for consumptive use. *Id.* at 1329. The plain fact of the matter is that no one knows what the maximum output of the No Name aquifer might ultimately be. The figure employed in both *Walton I* and *II* of 1,000 acre feet is far in excess of the natural flow of the creek due to the pumping stations installed by the litigants. The parties are in agreement that this enhancement of the natural flow has not yet resulted in a "mining" situation; *i.e.*, the aquifer has demonstrated the ability over the course of a number of years now to replenish itself cyclically. Thus, the figure of 1,000 acre feet is simply Judge Neill's best guess. On the evidence available, this court could do no better.

Since only 1,000 acre feet are available, however, these respective shares must be ratably reduced. *Walton II*, 647 F.2d at 50-51. The amount of water available represents 92.4% of that potentially reserved. The above figures must therefore be factored by that amount in order to arrive at actual allocation:

Walton	416 acre feet (92.4%)	384 acre feet
Other allottees	666.4 acre feet (92.4%)	616 acre feet
		1,000 acre feet

The Tribe, however, as lessee of the other allotments in the basin, is irrigating only 107.2 acres and, applying a duty of four acre feet, has no present need for more than 428.8 acre feet per year.[14] The final result thus becomes:

Walton's allocated share	384 acre feet
Other allottees' allocated share	428.8 acre feet
Available for other uses	187.2 acre feet
	1,000 acre feet

Could the court's task be considered complete at this point, everyone could heave a sigh of relief at the prospect of seeing this protracted litigation finally come to a close. Unfortunately, this is not to be, for interjection of the fishery issue throws what might have been a simple exercise in mathematics into a quagmire guaranteeing

[14] This result might appear to give the Tribe an advantage since, although its maximum potential allocation was ratably reduced, the same reducing factor was not applied to its actual allocation. That is to say, the Tribe will have the ability to apply a full four acre feet to its irrigated land, while Walton will have to make do with that water available after reduction, thereby giving him the choice of either irrigating slightly less land, or of applying slightly less water to the total quantity of irrigable land. This apparent anomaly is dictated by the analysis supplied in *Walton II* which holds due diligence on Walton's part to be the cornerstone of his right to share at all, whereas such diligence is an irrelevancy with respect to the tribal members. That is to say, it would seem that the reduction factor is to be applied to the gross potential allocation, rather than to the actual allocation.

the Circuit another opportunity to finally quantify allocations as sought by the competing interests herein.

It is important to take a conceptual shift in attitude from that exhibited by the parties up to this juncture. It has been all too easy in the past to view this litigation as a contest between Indians and non-Indians. *Walton II* makes it abundantly clear that this is not the case. Once the threshold issues of the ownership of irrigable acreage and the beneficial application of water thereto with reasonable diligence has been resolved in Walton's favor, he no longer stands in an adversarial posture vis a vis any other individual owner of allotted lands. The battleground, rather, concerns the Tribe as sovereign, and the individual allottees.

The Circuit held categorically that the "Colvilles have a reserved right to the quantity of water necessary to maintain the Omak Lake Fishery." *Walton II*, 647 F.2d at 48. This conclusion was based on the premise that "[a]n implied reservation of water for an Indian reservation will be found where it is necessary to fulfill the purposes of the reservation." *Id.* at 46. Applying the test set forth in *United States v. New Mexico*, 438 U.S. 696 (1978), the Court found that "preservation of the tribe's access to fishing grounds was one purpose for the creation of the Colville Reservation." 647 F.2d at 48. The lesson emerging from this sequential reasoning is that the Tribe has the right to whatever portion of the 1,000 acre feet available, up to and including all of it, if required for the maintenance of the fishery.

At the same time, the Circuit just as firmly held that "one purpose for creating this reservation was to provide a homeland for the Indians to maintain their agrarian society" and thus irrigation is also a purpose resulting in an implied reservation under *New Mexico, supra.* 647 F.2d at 47. Quoting *Arizona v. California*, 373 U.S. 546, 600-01 (1963), the Court noted that:

> the only feasible and fair way by which reserved water for the reservation can be measured is irrigable acreage. We conclude that, when the Colville reservation was created, sufficient appurtenant water was reserved to permit irrigation of all practicably irrigable acreage on the reservation.

Id. at 47-48 (citation omitted).

More strongly yet, the Court noted that:

> [W]hen allotments were made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners.

Id. at 50 (quoting *United States v. Powers*, 305 U.S. 527, 532 (1939)); *see also Walton I*, 460 F. Supp. at 1326 and authorities cited therein.

Such individual rights are not subject to diminution absent "express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history." 647 F.2d at 50. Thus, just as the Tribe, as sovereign, has a vested right to share in available reserved waters to whatever extent might be necessary for the maintenance of the hatchery, so the individual allottee, or his successor, has a vested right to share in available reserved waters to whatever extent might be necessary for irrigation. Obviously, these competing interests, each vested and each with the same priority date, are irreconcilable unless the quantity of water available is sufficient to satisfy both needs. In this case, it is not.

Expert testimony detailing the operation of the hatchery produced some surprises. One might tend to think of water used in connection with a hatchery as merely a medium in which the fish swim and feed. So it is, but a critical factor in such operation is the temperature of the

water, and since the water at issue is drawn from the underground aquifer and is exposed to ambient air temperature for only a brief period during its sojourn along No Name Creek, it serves a cooling function so as to maintain the temperature of the pools at a level conducive to propagation. Thus, in periods of high ambient air temperature and low humidity, the warming of the pools by tranference and evaporation will necessitate a higher flow to maintain the temperature at the desired level. Unfortunately, it is at precisely this time that crops will require a higher level of irrigation. The irreconcilability of use is therefore inescapable. Also, unfortunately, because the hatchery's use requirements are neither stable nor predictable on a long term basis, quantification is a distinct problem.

Dr. Koch's testimony as to hatchery needs was uncontroverted. Based on his experience over the preceding six years, he urged that a flow of 1.5 c.f.s. would be required between May 1st and June 1st; 2.0 c.f.s. between June 1st and July 15th; and 0.5 c.f.s. thereafter for the remainder of the spawning season. There being no other evidence in the record on this area, and no reason to question Dr. Koch's credibility, those figures will be accepted.

So concluding, however, does not answer the question of whose needs will take precedence. For that answer, the Circuit's adoption of the following quote is instructive:

> This [method of quantifying water rights] does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses . . . . The measurement used in defining the magnitude of the water rights is the amount of water necessary for agriculture and related purposes because this was the initial purpose of the reservation, but *the decree establishes a property right which the United States*

> *may utilize or dispose of for the benefit of the Indians as the relevant law may allow.*

647 F.2d at 48 (emphasis original) (quoting Robert from Simon H. Rifkind, Special Master, to the Supreme Court 265-66 (December 5, 1960)).

The parties have cited no "relevant law" which would allow the Tribe to dispossess its members, or other persons succeeding to the vested rights of those members, of an important property right; so important, indeed, that the value of the land to which the water right is appurtenant may be entirely destroyed without it. *See Winters v. United States*, 207 U.S. 564, 567 (1980). It could be argued, and probably will be on appeal, that language in *Walton II* could be construed as impliedly allowing the Tribe itself to determine whether its rights or those of its individual members should prevail. Not only would such a result nullify the concept that these competing rights are equal in priority with each arising out of purposes for which the reservation was created; but allowing a substantial, and perhaps total, diminution of vested property rights without resort to any definable process of law would fly in the face of provisions contained in the Indian Civil Rights Act codified at 25 U.S.C. § 1301 *et seq.*

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

647 F.2d at 52 (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

In 1968, Congress imposed an express limitation on tribal sovereignty in the form of the Indian Civil Rights Act:

> No Indian tribe in exercising powers of self-government shall—
>
> * * * *
>
> (5) take any private property for a public use without just compensation [or]
>
> * * * *
>
> (8) . . . deprive any person of liberty or property without due process of law.

25 U.S.C. § 1302.

Exactly what type of process may be due, or what remedies may be available for a breach, or what forum may be appropriate for enforcing the manifest intent of Congress to impose upon tribal government certain restrictions akin to those contained in the Bill of Rights, are all hotly debated and somewhat less than settled. *See, e.g., Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 964 n.31 (9th Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 314 (1982); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1345-46 (10th Cir. 1982); F. Cohen, *Handbook of Federal Indian Law* 242-44 (1982) and authorities cited therein. The existence of such questions, however, does not, by some means of prestidigitation, render the above-cited congressional mandate ineffective. Whatever "relevant law" may afford the predicate for extinguishing an individual's property rights in favor of the Tribe must take into account and reconcile this congressional limitation upon tribal sovereignty.

Absent some showing that relevant law provides for divesting allottees or their successors of otherwise vested property rights, I am inclined to conclude that the assimilation policy so evident in congressional intent underlying the General Allottment Act prevents the Tribe from unilaterally assigning weights and priorities to mutually legitimate reservation purposes.[15] See *Walton II*, 647

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[15] Even assuming that the internal political framework of tribal government would accord member/allottees sufficient due process

F.2d at 49; *United States v. Powers, supra*, 305 U.S. at 533; 25 U.S.C. § 381.

The final allocation, therefore, will be as set forth *supra*. Out of the 1,000 acre feet available, Walton is entitled to 384 acre feet; the remaining allotments to 428.8; and the hatchery to 187.2. At first glance this may appear to run afoul of the portion of *Walton II* which arquably gives the Tribe unlimited access to hatchery water. That access, however, is conditioned on the existence of a legal mechanism whereby one may be divested of valuable property rights. 647 F.2d at 48. The Tribe is hardly without recourse. Should the Secretary of Interior, by appropriate regulation or proceedings, alter the structure of allocation pursuant to 25 U.S.C. § 381, or should the Tribe seek to condemn water rights appurtenant to allotted lands in the No Name Creek Basin under 25 U.S.C. § 1302(5),[16] the currently envisioned impediment to unilateral impairment of allottee property rights would likely disappear.

Gratuitous though it may appear, this court is of the opinion that no matter what result obtains when the final chapter in this litigation is at long last written, the parties are going to have to come to grips with the proposition that a spirit of cooperation may be the best answer to efficient and fair utilization of water in the No Name Creek Basin. If the thrust and motivation

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with respect to restructuring or quantifying water rights, that in itself would be no guarantee that a non-member would find himself similarly situated. *Cf., Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682, 685 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981).

[16] *See generally, Seneca Constitutional Rights Organization v. George*, 348 F. Supp. 51, 59 (W.D. N.Y. 1972) (power to condemn is a function of sovereignty subject to congressional limitation). By noting this theoretical possibility, the court does not mean to imply that the Tribe's power of eminent domain is by any means a settled proposition, or that such authority could be employed with equal ease against both tribal members and non-Indians alike.

underlying the instant suit is merely to provide attorneys with a forum for launching abstruse forays into matters esoteric, then the entire project has been a phenomenal success. On the other hand, if the purpose of this action is to provide each of the competing interests an equitable share and thereby promote maximum utilization of a limited resource for the mutual benefit of all concerned, a little more unity of purpose may be indicated.

In the final analysis, the 1,000 acre feet now available would be adequate to service all needs except for a brief period, perhaps four to six weeks, during portions of June and July each year. Some use is already being made of holding pools to serve as reservoirs. Expansion of such a device might well render full irrigation possible even during maximum water utilization by the fishery.[17] Further, while there may be some engineering problem of which the court is presently unaware, no one has satisfactorily explained from the witness stand why fishery waters could not be recaptured prior to flowing into Omak Lake for application on irrigable land upstream.[18] If the parties are to avoid the expense and aggravation of having their day-to-day operations controlled by a water master, such cooperative ventures may be the ultimate answer.

There is one remaining issue which is not reflected in the Circuit's mandate, but which the parties have suggested be resolved. The Tribe has significantly enhanced the natural flow of No Name Creek by pumping water from the aquifer to the natural creek channel for delivery downstream.[19] Walton has been pumping out of the creek

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[17] Understandably, capital expenditure in this area would be unwise until such time as the parties' respective rights are fully and finally adjudicated.

[18] Dr. Koch expressed some reservations as to the economic and technical feasibility of such diversion, but he did agree that it would be possible.

[19] It has previously been settled that the creek and the aquifer constitute but a single hydrological unit. The Tribe's contention

for irrigation purposes. Now that the respective shares to which the parties are entitled have been quantified, it would appear only equitable that Walton reimburse the Tribe for the costs of pumping to the extent that he is withdrawing more water than would be available were the flow of No Name not enhanced. If the parties are unable to arrive at a fair fee, the court will retain jurisdiction to settle the matter either directly or through a water master.

THEREFORE IT IS ORDERED:

(1) Walton is entitled to share in the reserved waters of the No Name Creek Basin in the amount of 384 acre feet per year and will be enjoined from diverting more than that quantity from either the Creek or the underground aquifer.

(2) The other allottees, represented herein by the United States, are entitled to share in the resrved waters of the No Name Creek Basin in the amount of 428.8 acre feet per year and will be enjoined from diverting more than that quantity from either the Creek or the underground aquifer.

(3) The Tribe is entitled to share in the reserved waters of the No Name Creek Basin in the amount of 187.2 acre feet per year and will be enjoined from diverting more than that quantity from either the Creek or the underground aquifer.

(4) The Clerk shall enter judgment accordingly.

DONE BY THE COURT this 30th day of August, 1983.

/s/ ROBERT J. NICHOLS
United States District Judge

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that its pumping efforts fall within the doctrine of "developed waters" has been soundly rejected. Likewise, I reject the new, but parallel, argument that such pumping is merely a withdrawal of "stored waters."

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 79-4297, 79-4309 and 78-4383

COLVILLE CONFEDERATED TRIBES,
Plaintiff-Appellant,

v.

BOYD WALTON, JR., *et ux., et al.,*
Defendants-Appellees,

and

STATE OF WASHINGTON, *Intervening*
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM BOYD WALTON *et ux.,*
Defendants-Appellants,

and

STATE OF WASHINGTON,
Defendant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM BOYD WALTON, JR., *et ux.*,
Defendants,

and

STATE OF WASHINGTON,
Defendant-Appellant.

United States Court of Appeals
Ninth Circuit

Argued and Submitted June 6, 1980

Decided June 1, 1981

Appeal from the United States District Court
for the Eastern District of Washington

Before WRIGHT and SKOPIL, Circuit Judges, and CURTIS,* Senior District Judge.

WRIGHT, Circuit Judge:

Rehearing has been granted. The opinion filed on August 20, 1980 is withdrawn and is replaced by this opinion.

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* The Honorable Jesse W. Curtis, Senior District Judge for the Central District of California, sitting by designation.

The Colville Confederated Tribes initiated this case a decade ago. They sought to enjoin Walton, non-Indian owner of allotted lands, from using surface and ground waters in the No Name Creek basin. The State of Washington intervened, asserting its authority to grant water permits on reservation lands, and the case was consolidated with a separate suit brought by the United States against Walton.

I. BACKGROUND

A.

In 1871 the predecessors of Colville Confederate Tribes had no treaty with the United States and no reservation.[1] These Indians were contemporaneously described as "good farmers, [who] raise extensive crops, make good improvements, and own stocks of cattle and horses." [1871] *Report of the Commissioner of Indian Affairs*, 277.

After the Civil War, settlers had begun to encroach on Indian lands. The Farmer in charge at Fort Colville reported that violence was likely unless a reservation was established to protect Indian interests. *Id.* In response to a request from the Commissioner of Indian Affairs, President Grant created the Colville Reservation. Executive Order of July 2, 1872, *reprinted in* 1 Kapler, *Indian Affairs, Laws and Treaties*, 915-16. (2d ed. 1904).[2] Twenty years later, the northern half of the reservation

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[1]The Colville Confederated Tribes included the Methow, Okanogon, Sampoil, Nespelem, Lake, and Colville Tribes. *See Confederated Tribes of the Colville Reservation v. United States*, 4 Ind. Cl. Comm. 151 (1956); I. Kappler, *Indian Affairs and Treaties*, 915 (2d ed. 1904). In this opinion, they will be referred to as the Tribe or the Colvilles.

[2] Indians who did not live on the land reserved for them were compelled to leave valuable tracts on which they had made extensive improvements and move to the reservation. [1872] *Report of the Commissioner of Indian Affairs*, 62.

was taken from the Indians and opened for entry and settlement.[3]

In 1906, Cogress ratified an agreement with the Colvilles that provided for distribution of reservation lands to the Indians pursuant to the General Allotment Act of 1887, 24 Stat. 388, and for dispositoin of the remainder by entry and settlement. Act of Mar. 22, 1906, Pub.L. No. 59-61, ch. 1126, 84 Stat. 80. The agreement was effectuated by Presidential proclamation in 1916.[4] 39 Stat. 1778.

In 1917, a row of seven allotments was created in the No Name Creek watershed. Walton, a non-Indian, now owns the middle three, numbers 525, 2371 and 894. He bought them in 1948 from an Indian, not a member of the Tribe, who had begun to irrigate the land by diverting water for 32 acres from No Name Creek. Walton immediately procured a permit from the state to irrigate 65 acres by diverting up to 1 cubic foot per second "subject to existing rights." He now irrigates 104 acres and uses additional water for domestic and stock water purposes.

The United States holds the remaining allotments in trust for the Colville Indians. Allotments 526 and 892 are north of Walton's property and allotments 901 and 903 are south. Allotments 892, 901 and 903 are held for heirs of the original allottees, but the Tribe has a long-

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[3] Approximately 1.5 million acres were returned to the public domain. Act of July 1, 1892, 27 Stat. 62.

[4] The reservation remained open for settlement until 1934, when the Secretary of the Interior "temporarily" withdrew the surplus lands pursuant to the Reorganization Act. Congress permanently restored those lands to the beneficial use of the Tribe in 1956. Act of July 24, 1956, Pub. L. No. 84-772, ch. 684, 70 Stat. 626. In passing that Act, Congress acknowledged that the Indians' consent to opening the reservation for settlement was of questionable validity. *See.* H.R. Rep. No. 2080, 84th Cong., 2d Sess. 2 (1956).

term lease. Allotment 526 is beneficially owned by the Tribe.[5]

B.

The No Name Creek is a spring-fed creek flowing south into Omak Lake, which has no outlet and is saline. The No Name hydrological system, consisting of an underground aquifer and the creek, is located entirely on the Colville Reservation.

The aquifer lies under the Indians' northern allotments and the northern tip of Walton's allotment, number 525. No Name Creek originates on the southern tip of the Indians' allotment number 802 and flows through Walton's allotments and the Indians' southern allotments.

C.

Salmon and trout were traditional foods for the Colville Indians, but the salmon runs have been destroyed by dams on the Columbia River. In 1968, the Tribe, with the help of the Department of the Interior, introduced Lahonton cutthroat trout into Omak Lake. The species thrives in the lake's saline water, but needs fresh water to spawn. The Indians cultivated No Name Creek's lower reach to establish spawning grounds but irrigation use depleted the water flow during spawning season. The federal government has given the Indians fingerlings to maintain the stock of trout.

II. THE CASE BELOW

The trial court found that 1,000 acre feet per year of water were available in No Name Creek Basin in an average year. It calculated the quantity of the Colvilles' reserved water rights on the basis of irrigable acreage. The court excluded the northern-most allotment, number

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[5] We assume that none of the Colvilles' allotments ever passed from Indian ownership.

526, because the evidence showed that it was formerly irrigated with the surface waters of Omak Creek, and the Tribe had not demonstrated that water to irrigate it was required from the No Name system.

The trial court determined the Indians had a reserved right to 666.4 acre feet per year of water from the No Name Creek Basin. It held that Walton was not entitled to share in the Colvilles' reserved water rights. The trial court found, however, that the Colvilles were irrigating only a portion of the irrigable acres included in its calculation.

Under the district court's findings, in an average year there are 333.6 acre feet per year of water not subject to the Indians' reserved right. There are an additional 237.6 acre feet per year of water to which the Indians have a reserved right, but which they are not currently using. This water is available for appropriation by non-Indians, subject to the Indians' superior right. The court held that Walton had a right to irrigate the 32 acres under irrigation at the time he acquired his land, with a priority date of the actual appropriation of water for that use.

The court also held that the Indians were potentially entitled to use water to propagate trout, but refused to award water for that purpose. It concluded that spawning was unnecessary because fingerlings were provided free by the federal government.

By post-trial motion, the Indians sought permission to use some of their irrigation water for trout spawning. The motion was granted and the Tribe has since pumped aquifer water from their wells into No Name Creek during spawning season.

Finally, the court decided that the state could regulate No Name water not reserved for Indian use.

Walton, the Tribe and the State appeal parts of the decision. *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. Wash. 1978).[6]

III. THE TRIBE'S WATER RIGHTS

The Colvilles argue they have a right to use the waters of the No Name system under the implied-reservation, or *Winters* doctrine. We first consider the existence and the extent of that right.

A.

Congress has the power to reserve unappropriated water for use on appurtenant lands withdrawn from the public domain for specific federal purposes. *United States v. New Mexico*, 438 U.S. 696, 698, 98 S.Ct. 3012, 3013, 57 L.Ed.2d 1052 (1978). Where water is needed to accomplish those purposes, a reservation of appurtenant water is implied. *Id.* at 700, 98 S.Ct. at 3014; *Cappaert v. United States*, 426 U.S. 128, 139, 96 S.Ct. 2062, 2069, 48 L.Ed.2d 523 (1976). The United States acquires a water right vesting on the date the reservation was created, and superior to the rights of subsequent appropriators. *Cappaert*, 436 U.S. at 138, 96 S.Ct. at 2069.

An implied reservation of water for an Indian reservation will be found where it is necessary to fulfill the purposes of the reservation. In *United States v. Winters*, 207 U.S. 564, 576, 28 S.Ct. 207, 211, 52 L.Ed. 340 (1908), the Court found an implied reservation because the land of the Fort Belknap reservation would have been value-

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[6] The Tribe asked the United States to intervene on its behalf. Instead, the Justice Department filed a separate suit against Walton, based on the theory that the Secretary of the Interior has exclusive jurisdiction over all the water on the reservation. The trial court consolidated the proceedings *sua sponte*. The United States filed an appeal from the decision and the Tribe moved "not to be bound" by any ruling on *U.S. v. Walton*, No. 79-4619. The United States has since dropped its appeal and we deny the Tribe's motion.

less without water. Similarly, an implied reservation was found where water was "essential to the life of the Indian people." *Arizona v. California*, 373 U.S. 546, 599, 83 S.Ct. 1468, 1497, 10 L.Ed.2d 542 (1963).

In those cases, if water had not been reserved, it would have been subject to appropriation by non-Indians under state law. Because the Indians were not in a position, either economically or in terms of their development of farming skills, to compete with non-Indians for water rights, it was reasonable to conclude that Congress intended to reserve water for them.[7]

The Colvilles were in a similar position when their reservation was created. As in *Winters*, the Indians relinquished extensive land and water holdings when the reservation was created. Some gave up valuable tracts with extensive improvements. Note 2, *supra*.

Congress intended to deal fairly with the Indians by reserving waters without which their lands would be useless. *Arizona v. California*, 373 U.S. at 600, 83 S.Ct. at 1497. We hold that water was reserved when the Colville Reservation was created.

B.

The more difficult question concerns the amount of water reserved. In determining the extent of an implied reservation of water for a national forest, the Supreme Court held:

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the neces-

[7] The *Winters* doctrine applies to reservations created by treaty or executive order. *Arizona v. California*, 373 U.S. 546, 598, 83 S.Ct. 1468, 1496, 10 L.Ed.2d 542 (1963).

> sary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

United States v. New Mexico, 438 U.S. at 702, 98 S.Ct. at 3015.

We apply the *New Mexico* test here. The specific purposes of an Indian reservation, however, were often unarticulated.[8] The general purpose, to provide a home for the Indians, is a broad one and must be liberally construed.[9] We are mindful that the reservation was created for the Indians, not for the benefit of the government.

To identify the purposes for which the Colville Reservation was created, we consider the document and circumstances surrounding its creation, and the history of the

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[8] For example, the order creating the Colville reservation read:

> It is hereby ordered that . . . the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

Executive Order of July 2, 1872, *reprinted in* 1 Kappler, *Indian Affairs and Treaties*, 916 (2d ed. 1904). Reservations were commonly created with similar language. *See* U.S. Dept. of the Interior, *Federal Indian Law*, 613-22 (1958). The President's orders responded to requests from officers in the Department of the Interior but it is difficult to identify or to know how much weight to give to their purpose.

[9] *See United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905). The rule of liberal construction should apply to reservations created by Executive Order. *See Arizona v. California*, 373 U.S. 546, 598, 83 S.Ct. 1468, 1496, 10 L.Ed.2d 542 (1963). Congress envisioned agricultural pursuits as only a first step in the "civilizing" process. *See, e.g.*, 11 Cong. Rec. 905 (1881). This vision of progress implies a flexibility of purpose.

Indians for whom it was created. We also consider their need to maintain themselves under changed circumstances.[10] *See United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed 1089 (1905).

These factors demonstrate that one purpose for creating this reservation was to provide a homeland for the Indians to maintain their agrarian society. In a similar setting, the Supreme Court agreed with a Master's finding that water was reserved to meet future as well as present needs, and concluded "that the only feasible and fair way by which reserved water for the reservation can be measured is irrigable acreage." *Arizona v. California*, 373 U.S. at 600-01, 83 S.Ct. at 1497-98. We conclude that, when the Colville reservation was created, sufficient appurtenant water was reserved to permit irrigation of all practicably irrigable acreage on the reservation.

Providing for a land-based agrarian society, however, was not the only purpose for creating the reservation. The Colvilles traditionally fished for both salmon and trout. Like other Pacific Northwest Indians, fishing was of economic and religious importance to them. *See Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 665, 99 S.Ct. 3055, 3064, 61 L.Ed.2d 823 (1978); *United States v. Winans, supra;* [1871] Report of the Commissioner of Indian Affairs 277.

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[10] *See Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918) (exclusive right to fish implied because necessary for self-sustaining community); *United States v. Shoshone Tribe*, 304 U.S. 111, 58 S.Ct. 794, 82 L.Ed. 1213 (1938) (reservation for "absolute and undisturbed use and occupation" includes ownership of minerals and standing timber); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406, 88 S.Ct. 1705, 1707, 20 L.Ed.2d 697 (1968) (reservation "for a home" includes hunting and fishing rights); and *United States v. Finch*, 548 F.2d 822, 832 (9th Cir. 1976) (U.S. intended to reserve right of Indians to sustain themselves "from any source of food which might be available.")

The Tribe's principal historic fishing grounds on the Columbia River have been destroyed by dams. The Indians have established replacement fishing grounds in Omak Lake by planting a non-indigenous trout.

We agree with the district court that preservation of the tribe's access to fishing grounds was one purpose for the creation of the Colville Reservation. Under the circumstances, we find an implied reservation of water from No Name Creek for the development and maintenance of replacement fishing grounds.

We note that the nature of a right to water for a replacement fishery is such that it cannot coexist with continuing rights to water for a fishery in the watershed where the fishery historically existed. Walton does not argue that the tribe has such rights. We affirm the district court's holding that the Colvilles have a reserved right to the quantity of water necessary to maintain the Omak Lake Fishery.

C.

The district court held that water for spawning could not be awarded at this time because the federal government provides the necessary fingerlings. We reverse this holding.

The right to water to establish and maintain the Omak Lake Fishery includes the right to sufficient water to permit natural spawning of the trout. When the Tribe has a vested property right in reserved water, it may use it in any lawful manner. As a result, subsequent acts making the historically intended use of the water unnecessary do not divest the Tribe of the right to the water.

We recognize that open-ended water rights are a growing source of conflict and uncertainty in the West. Until their extent is determined, state-created water rights cannot be relied on by property owners. *See* Laird, *The Winters Cloud Over the Rockies: Water Rights and the*

Development of Western Energy Resources, 7 Am. Indian L.Rev. 15 (1979); Public Land Law Review Commission, *One Third of the Nations Lands*, 144 (1970).

Resolution of the problem is found in quantifying reserved water rights, not in limiting their use. The Special Master in *Arizona v. California* determined that the purposes for which the reservation was created governed the quantification of reserved water, but not the use of such water:

> This [method of quantifying water rights] does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses . . . . The measurement used in defining the magnitude of the water rights is the amount of water necessary for agriculture and related purposes because this was the initial purpose of the reservation, but the *decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow.*

Report from Simon H. Rifkind, Special master, to the Supreme Court 265-66 (December 5, 1960) (emphasis added).

The Department of the Interior has taken the position that a change of use is permissible. See Memorandum from Solicitor of the Department of the Interior to the Secretary of the Interior, February 1, 1964 (use of reserved water for recreation and housing development).

Finally, we note that permitting the Indians to determine how to use reserved water is consistent with the general purpose for the creation of an Indian reservation—providing a homeland for the survival and growth of the Indians and their way of life.

D.

We agree with the district court that water for Allotment 526 need not be included in its calculations, since

such water is potentially available from Omak Creek.[11] The Indians have not demonstrated that water is unavailable from Omak Creek, or that its use involves significant disadvantages.[12]

IV. THE GENERAL ALLOTMENT ACT OF 1887

We next consider Walton's rights as the fee owner of allotted land, and reverse the district court's judgment that he has no right to reserved water.

A.

The General Allotment Act provided that land on reservations could be allotted for the exclusive use of individual Indians. Remaining land was to be made available for homesteading by non-Indians. After holding allotted lands in trust for individual Indians for a 25-year period, the federal government could convey the land to the allottee in fee, "discharged of said trust and free of all charge or incumbrance whatsoever." 25 U.S.C. § 348.

Because the use of reserved water is not limited to fulfilling the original purposes of the reservation, Congress had the power to allot reserved water rights to individual Indians, and to allow for the transfer of such rights to non-Indians. Whether it did so is a question of congressional intent.

The General Allotment Act represented the shift in federal objectives from segregation of Indians on reservations to assimilation of them in non-Indian culture and society. Its primary sponsor, Senator Dawes, explained that "the quicker [the Indian] is mingled with the whites

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[11] Omak Creek and No Name Creek have no surface connection.

[12] The Indians may be deprived of the use of wells drilled on allotment 526 but those were constructed with the understanding that this litigation would be unaffected.

in every particular the better it will be." Report of the Secretary of the Interior, *Proceedings of Mohonk Lake Conference*, H.R. Exec. Doc. No. 75, 49th Cong., 2d Sess. 992 (1887).

The Act was designed to encourage Indians to become self-supporting citizens by making them landowners. *See generally* D. Otis, *The Dawes Act and the Allotment of Indian Lands* 8-32 (1973). Allotted lands were held in trust for a 25-year period because of

> the desire to protect the Indian against sharp practices leading to Indian landlessness, the desire to safeguard the certainty of titles, and the urge to continue an important basis of governmental activity [on the Indians' behalf].

F. Cohen, *Handbook of Federal Indian Law* 221 (1940); U.S. Department of Interior, *Federal Indian Law* 788-89 (1958).

The only reference to water rights in the Act is found in section 7:

> Section 7. In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by an riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

25 U.S.C. § 381.

The Act was passed over 20 years before the Supreme Court announced the implied-reservation doctrine in *Winters*. There is nothing to suggest Congress gave any

consideration to the transferability of reserved water rights. To resolve this issue, we must determine what Congress would have intended had it considered it.

B.

It is settled that Indian allottees have a right to use reserved water. *United States v. Powers*, 305 U.S. 527, 59 S.Ct. 344, 83 L.Ed 330 (1939).[13] "[W]hen allotments were made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal water essential for cultivation passed to the owners." *Id.* at 532, 59 S.Ct. at 346. We must determine whether non-Indian purchasers of allotted lands also obtain a right to some portion of reserved waters.

(1)

The general rule is that termination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history. *See Bryan v. Itasca County*, 426 U.S. 373, 392-93, 96 S.Ct. 2102, 2112-13, 48 L.Ed.2d 710 (1975); *Mattz v. Arnett*, 412

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[13] In *Powers*, the federal government had constructed an irrigation project on the Crow Reservation capable of irrigating 20,000 acres. Due to a drought and upstream diversions by respondents (non-Indian successors to Indian allottees), 8,000 acres within the project could not be irrigated.

The government sought an injunction against respondents' diversions. The irrigation project had been completed prior to allotment of respondents' lands. The government argued that the project served to "dedicate and reserve" water for irrigation of the 20,000 acres, and that the rights subsequently acquired by Indian allottees were subject to that reservation.

The Court stated the respondents "succeeded to the interest of the original allottees either by mesne conveyances or by purchase at government sales of deceased allottees' lands." 305 U.S. at 531, 59 S.Ct. at 346. It then recited the government's argument and refuted it, relying in part on section 7 of the Allotment Act, by

U.S. 481, 504-05, 93 S.Ct. 2245, 2257-58, 37 L.Ed.2d 92 (1972). Upon careful consideration, we conclude this principle supports the proposition that an Indian allottee may sell his right to reserved water.

The district court's holding that an Indian allottee may convey only a right to the water he or she has actually appropriated with a priority date of actual appropriation reduces the value of the allottee's right to reserved water. We think this type of restriction on transferability is a "diminution of Indian rights" that must be supported by a clear inference of Congressional intent.

By placing allotted lands in trust for 25 years, Congress evinced an intent to protect Indians by preventing transfer of those lands.[14] But there is no basis for an inference that some restrictions survived beyond the trust period. Congress provided for extensions of the trust period, but directed that fee title be conveyed to the allottee when the period expired. We think the fee in-

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demonstrating that Indian allottees acquired a right to share in reserved water.

The Court held the government had shown no basis for the injunction, but did not consider "the extent or precise nature of respondents' rights in the waters." 305 U.S. at 533, 59 S.Ct. at 346.

If an Indian allottee's right to reserved water does not pass to his or her successor, there would have been a basis for the injunction. Walton therefore argues that *Powers* holds an allottee's right to reserved water is acquired by his non-Indian successor. The government, however, did not present that issue. The Court rejected the only argument made by the government, *i.e.*, that Indian allottees did not acquire rights to reserved water.

[14] The subsequent history of the General Allotment Act demonstrates that this protection was extraordinarily inadequate. By the 1930's approximately 90 million acres out of 140 million acres owned by Indian tribes in 1887 had passed into non-Indian ownership. American Indian Policy Review Commission, Final Report 66-70 (1977). This history, however, has no bearing on congressional intent with regard to water rights in 1887; if anything, it demonstrates Congress intended less protection for Indian rights than the rhetoric of the Act's sponsor would suggest.

cluded the appurtenant right to share in reserved waters, and see no basis for limiting the transferability of that right.

This conclusion is supported by our decision in *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 342 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957). *Ahtanum* held that non-Indian purchasers of alloted lands are entitled to "participate ratably" with Indian allottee in the use of reserved water. *See United States v. Adair*, 478 F.Supp. 336 (D. Ore. 1979); *United States v. Hibner*, 27 F.2d 909 (D. Idaho 1928).

(2)

In determining the nature of the right acquired by non-Indian purchasers, we consider three aspects of an allottee's right to use reserved waters.

First, the extent of an Indian allottee's right is based on the number of irrigable acres he owns. If the allottee owns 10% of the irrigable acreage in the watershed, he is entitled to 10% of the water reserved for irrigation (i.e., a "ratable share"). This follows from the provision for an equal and just distribution of water needed for irrigation.

A non-Indian purchaser cannot acquire more extensive rights to reserved water than were held by the Indian seller. Thus, the purchaser's right is similarly limited by the number of irrigable acres he owns.

Second, the Indian allottee's right has a priority as of the date the reservation was created. This is the principal aspect of the right that renders it more valuable than the rights of competing water users, and therefore applies to the right acquired by a non-Indian purchaser. In the event there is insufficient water to satisfy all valid claims to reserved water, the amount available to each claimant should be reduced proportionately.

Third, the Indian allottee does not lose by non-use the right to a share of reserved water. This characteristic is not applicable to the right acquired by a non-Indian purchaser. The non-Indian successor acquires a right to water being appropriated by the Indian allottee at the time title passes. The non-Indian also acquires a right, with a date-of-reservation priority date, to water that he or she appropriates with reasonable diligence after the passage of title. If the full measure of the Indian's reserved water right is not acquired by this means and maintained by continued use, it is lost to the non-Indian successor.

The full quantity of water available to the Indian allottee thus may be conveyed to the non-Indian purchaser. There is no diminution in the right the Indian may convey. We think Congress would have intended, however, that the non-Indian purchaser, under no competitive disability vis-a-vis other water users, may not retain the right to that quantity of water despite non-use. *See United States v. Adair*, 478 F.Supp. at 348-49; *United States v. Hibner*, 27 F.2d at 912.

C.

The district court's holding that Walton has no right to share in water reserved when the Colville reservation was created is reversed. On remand, it will need to determine the number of irrigable acres Walton owns, and the amount of water he appropriated with reasonable diligence in order to determine the extent of his right to share in reserved water.

V. STATE PERMITS

Finally, we consider Walton's claim to water rights based on state water permits. We hold that the state has no power to regulate water in the No Name system, and the permits are of no force and effect.

A.

State regulatory authority over a tribal reservation may be barred either because it is pre-empted by federal law, or because it unlawfully infringes on the right of reservation Indians to self government. *While Mountain Apache Tribe v. Bracker*, ——— U.S. ——, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980); *White Mountain Apache Tribe v. Arizona*, Nos. 78-3427, 79-4294, Slip op. p. 1190, —— F.2d —— (9th Cir., April 6, 1981). Although these barriers are independent, they are related by the concept of tribal sovereignty. "The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." *Bracker*, 100 S.Ct. at 2573.

Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. *Id.; United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975).

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

United States v. Wheeler, 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1978) (citations omitted).

A tribe's inherent power to regulate generally the conduct of non-members on land no longer owned by, or held in trust for the tribe was impliedly withdrawn as a necessary result of its dependent status. *Montana v. United States*, —— U.S. ——, 101 S.Ct. 1245, 1257, 67 L.Ed.2d 493 (1981). Exceptions to this implied withdrawal exist. A tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee lands

within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe. *Id.* This includes conduct that involves the tribe's water rights. *See id.* at n.15.

A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users. The Colvilles' complaint in the district court alleged that the Waltons' appropriations from No Name Creek imperiled the agricultural use of downstream tribal lands and the trout fishery, among other things. *Cf. Montana*, —— U.S. at ——, 101 S.Ct. at 1259 (complaint did not allege peril to subsistence or welfare of tribe from non-Indian hunting and fishing on fee lands).

Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Especially in arid and semi-arid regions of the West, water is the lifeblood of the community. Its regulation is an important sovereign power.

Although we need not decide whether this power resides exclusively in the tribe or the federal government, or whether it may be exercised by them jointly, its importance forms the backdrop for our consideration of the pre-emption issue.

B.

We hold that state regulation of water in the No Name system was preempted by the creation of the Colville Reservation. The geographic facts of this case make resolution of this issue somewhat easier than it otherwise might be. The No-Name water system is non-navigable and is entirely within the boundaries of the reservation. Although some of the water passes through lands now in non-Indian ownership, all of those lands are also entirely within the reservation boundaries.

The Supreme Court has held that water use on a federal reservation is not subject to state regulation absent explicit federal recognition of state authority. *Federal Power Commission v. Oregon*, 349 U.S. 435, 75 S.Ct. 832,

99 L.Ed. 1215 (1955).[15] Thus, in creating the Colville Reservation, the federal government preempted state control of the No Name system.[16]

In *United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1934), was held that state water laws are not controlling on an Indian reservation:

> [T]he Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation. In fact, the Montana enabling act specifically provided that Indian lands within the limits of the state, 'shall remain under the absolute jurisdiction and control of the Congress of the United States.'

Identical language appears in the Washington Enabling Act, Ch. 180, 25 Stat. 676, 677 (1889).[17]

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[15] The FPC had licensed construction of a dam on federal property. The lands that would have been flooded were held by the federal government. They had been reserved either as an Indian reservation or for power generation. The flow of the river would have been undiminished below the dam.

This court held the licensee had to obtain state approval because of the state's control over non-navigable waters on the public domain. 211 F.2d 347 (9th Cir. 1954).

The Supreme Court reversed. It held that congressional acts giving the states control of water on the public domain were inapplicable on a federal reservation.

> It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated for some other purpose . . . . [I]t is enough for the instant case, to recognize that these Acts do not apply to this license, which relates only to the use of waters on reservations of the United States.

349 U.S. at 448, 75 S.Ct. at 840 (citations omitted).

[16] We need not consider what effect the opening of reservation lands for entry and settlement had on the control of water on or appurtenant to such lands. All of the lands here involved were allotted.

[17] The state argues that *McIntire* is distinguishable for two reasons. First, it argues the court had already held the waters were

We adhere to this holding because we find no indication Congress intended the state to have this power. In a series of Acts culminating in the Desert Lands Act of 1877, ch. 107, 19 Stat. 377, Congress gave the states plenary control of water on the public domain. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64, 55 S.Ct. 725, 731, 79 L.Ed.2d 1356 (1935). Based on this and other legislation, the Supreme Court concluded that Congress almost invariably defers to state water law when it expressly considers water rights. *United States v. New Mexico*, 438 U.S. 696, 702, 98 S.Ct. 3012, 3015, 57 L.Ed.2d 1052 (1978).

This deference is not applicable to water use on a federal reservation, at least where such use has no impact off the reservation. *FPC v. Oregon*, 349 U.S. at 448, 75 S.Ct. at 840. The usual policy stems in part from the need to permit western states to fashion water rights regimes that are responsive to local needs, and in part from the "legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." *California v. United States*, 438 U.S. 645, 653-54, 668-69, 98 S.Ct. 2985, 2989-90, 2997-98, 57 L.Ed.2d 1018 (1978).

Neither rationale is applicable here. Where land is set aside for an Indian reservation, Congress has reserved it for federal, as opposed to state needs. Because the No Name system is located entirely within the reservation, state regulation of some portion of its waters would create the jurisdictional confusion Congress has sought to avoid.

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reserved. It is clear, however, that the court did not rely on this in holding state water law inapplicable on the reservation.

Second, Washington argues the purchase of allotted lands by a non-Indian "severed . . . any special federal trust status." The lands are still part of the reservation, however. The only mention of water rights in the Allotment Act suggests continued federal control. 25 U.S.C. § 381.

Public Law 280, Act of August 15, 1953, 67 Stat. 588, did not delegate this regulatory power to the state. Nor do we perceive the McCarran Amendment, 43 U.S.C. § 666, as expanding the state's regulatory powers over water on a federal reservation.

Finally, we note that the state's interest in extending its water law to the reservation is limited in this case. Tribal or federal control of No Name waters will have no impact on state water rights off the reservation.

Thus, we conclude that Walton's state permits are of no force and effect.

VI. CONCLUSION

On remand, the district court will calculate the respective rights of the parties. To the extent Walton's use of water exceeds his rights and interferes with the rights of the tribe, it will be enjoined.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED for proceedings in conformance with this opinion. The parties will bear their own costs on this appeal.[18]

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[18] We are persuaded of the correctness of our analysis and conclusion concerning the transferability of the water rights involved in this litigation. Nevertheless, we recognize that reasonable minds hold conflicting views. State and federal courts, state and federal agencies responsible in water rights administration, and the numerous Indian tribes, allottees and their transferees, are plagued almost on a daily basis with the problems and uncertainties surrounding the issues discussed in this opinion. This case presents an appropriate vehicle for the Supreme Court to give guidance and stability to an area of great unrest and uncertainty in Western water and land law. A definitive resolution is overdue. The magnitude of the problem cannot be overstated.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-4285

COLVILLE CONFEDERATED TRIBES,
Plaintiffs-Appellants,

vs.

BOYD WALTON, JR., *et ux, et al.*,
Defendants-Appellees.

DC CV 3421

[Filed Apr. 23, 1985]

ORDER DENYING REHEARING AND
THE EN BANC SUGGESTION

Before: WRIGHT, SNEED and ALARCON, Circuit Judges.

The appellees' Petition for Rehearing, filed on February 8, 1985, is denied. The Suggestion for Rehearing En Banc has been circulated to all active judges of the court, none of whom has voted to have the appeal reviewed en banc. The En Banc Suggestion is denied.

SNEED, Circuit Judge, Concurring Separately:

I have no difficulty with the opinion of the court except with respect to the conclusion that Walton is entitled only to sufficient water to irrigate thirty acres. The opinion rejects the trial court finding that "Walton exercised

reasonable diligence in irrigating a minimum of 104 acres." *See* pp. 7, 10. This is done on the ground that the record lacks "sufficient evidence that the non-Indian owners preceding Walton had the requisite intent to irrigate any additional acreage." *See* p. 11, n.4. I agree with this conclusion. I write only to point out that an Indian allotttee who remains in possession of his allotment is treated much more generously. Such an allottee is entitled to sufficient water to meet his essential agricultural needs "when those needs arise." *See United States v. Adair*, 723 F.2d 1394, 1415 (9th Cir. 1983) (quoting *United States v. Adair*, 478 F. Supp. 336, 346 (D. Or. 1979)), *cert. denied*, 104 S. Ct. 3536 (1984). The full measure of his rights need not be exercised immediately. *Id.* at 1416. The court in *Adair* refused to extend this generous treatment to a non-Indian successor to an Indian allottee because of *Colville Confederated Tribes v. Walton (Walton II)*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 92 (1981). The combined effect of *Walton II*, as explicated by this case, *Walton III*, and *Adair*, is to have made impossible the transfer by an Indian allottee to a non-Indian successor the full economic value of the allotment. *Cf. United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984). There is a serious question whether this properly reflects congressional intent.

However, the law of this court is adequately clear, and the existence of a contrary congressional intent sufficiently uncertain, to require that I concur in the court's opinion. Equal treatment of Indian allottees and non-Indian successors in interest of Indian allottees would better serve the interests of justice.

Supreme Court, U.S.
FILED
AUG 21 1985

No. 85-125

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BOYD WALTON, JR., *et ux, et al.*,
Petitioners,

v.

COLVILLE CONFEDERATED TRIBES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS COLVILLE CONFEDERATED TRIBES IN OPPOSITION

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QUESTIONS PRESENTED

Whether this Court should review this case which arises primarily from the invalid claims by Petitioner Walton to Respondent Colville Confederated Tribe's reserved rights to water which were denied by the court below by reason of the fact that Petitioner Walton claims reserved rights for lands which are "water-saturated or subirrigated" for which an award of water would, declared the court below, amount to a wasteful "double allocation," which issues do not involve either Constitutional or statutory questions presented by Petitioner Walton?

Whether this Court should consider the questions presented by Petitioner Walton due to the fact that the Opinion of the Court of Appeals here for review (*Walton III*) turns markedly upon admitted failure of the district court to comply with the explicit mandate of the Court of Appeals in *Walton II* and does not turn upon the Constitutional questions presented by Petitioner Walton?

ERRONEOUS STATEMENT AS TO PARTIES BEFORE THE NINTH CIRCUIT

Petitioner Walton asserts, in error, that the United States of America and the State of Washington were before the Court of Appeals for the Ninth Circuit in this litigation. The Court of Appeals (a) on May 29, 1984, granted the motion of the United States for a voluntary dismissal;* and (b) by its Order dated October 3, 1984,** declared:

> On appeal after remand, appellants [Colville Confederated Tribes] challenge the State's status as a party to this appeal. . . . the State's . . . interests are insufficient to support the State's continued status as a party to this appeal and thus dismisses the State. . . . [allowing] a brief as an amicus curiae. . . .

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* Appendix A.

** Appendix B.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-125

BOYD WALTON, JR., *et ux, et al.*,
Petitioners,

v.

COLVILLE CONFEDERATED TRIBES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE RESPONDENTS COLVILLE CONFEDERATED TRIBES IN OPPOSITION

OPINIONS BELOW

Walton I, the initial decision in this case, is reported as *Colville Confederated Tribes, Plaintiff v. Boyd Walton, Jr., et ux, et al., Defendants; State of Washington, Defendant-Intervenor; United States of America, Plaintiff v. William Boyd Walton, et ux, et al., and the State of Washington, Defendant*, 460 F.Supp. 1320 (U.S.D.C. E.D.Wa. October 25, 1978).

Walton II is reported as *Colville Confederated Tribes, Plaintiff-Appellant v. Boyd Walton, Jr., et ux, et al., Defendants-Appellees and State of Washington, Intervening Defendant-Appellee; United States of America, Plaintiff-Appellee v. William Boyd Walton, et ux, Defendants-Appellants, and State of Washington, Defendant-Appellant*, 647 F.2d 42 (CA 9, 1981); *cert. den.*, 454 U.S. 1092 (1981).

Memorandum Decision, August 31, 1983, United States District Court for the Eastern District of Washington, *Colville Confederated Tribes v. Walton*, on remand from *Walton II*; not reported; set forth in Appendix to Petition for Certiorari, 16a.

Walton III reported as *Colville Confederated Tribes, Plaintiffs-Appellants v. Boyd Walton, Jr., et ux, et al., Defendants-Appellees*, 752 F.2d 397 (CA 9, January 21, 1985).

Order Denying Rehearing and En Banc Suggestion, 758 F.2d 1324 (CA 9, April 22, 1985).

JURISDICTION

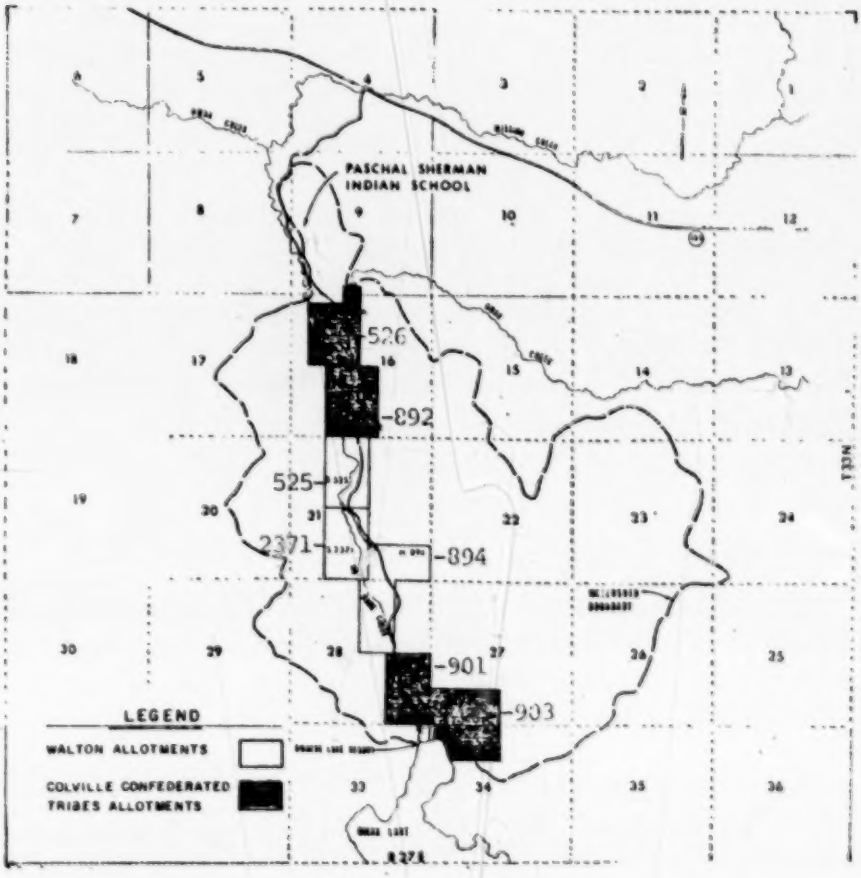
The judgment of the Court of Appeals was entered on January 21, 1985. The Order Denying Rehearing and the En Banc Suggestion was entered April 22, 1985. The Petition for Certiorari was filed July 23, 1985. The jurisdiction of this Court was invoked under 28 U.S.C. 1251(1).

STATEMENT OF THE CASE

Presented here is the continuation of 15 years of contentious litigation between Respondents Colville Confederated Tribes—hereafter referred to as Respondent Tribe—which occupy the Colville Indian Reservation, State of Washington, and non-Indian Petitioners Waltons—hereafter referred to as Petitioner Walton—over reserved rights to the use of water. This is a classic example of the irreconcilable conflict between Indian and non-Indian in which the Indian survival turns upon the concepts applied by the opinion of the Court of Appeals that Petitioner Walton seeks here to have reversed.

Involved are questions of whether Petitioner Walton, who occupies three former Colville allotments, will be permitted totally to monopolize all of the meager supply of water in a non-navigable stream, referred to as No Name Creek. That stream, contrary to Petitioner Wal-

ton's assertion,[1] does *not* arise upon Walton's property but rather ". . . originates on [Colville] Allotment No. 892, north of the Walton property."[2] No Name Creek arises and flows its full length within the Colville Indian Reservation. As can be seen on the Location Map which appears below, No Name Creek arises on Colville Allotment 892 and traverses three former Colville allotments now occupied by non-Indian Walton. After traversing those three allotments, No Name Creek enters



LOCATION MAP

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[1] Pet.Cert., p. 4.

[2] *Walton I* at p. 1324.

Colville Allotments 901 and 903 and terminates in Omak Lake, a closed, highly saline body of water, which is likewise entirely within the Colville Indian Reservation.

Non-Indian Petitioner Walton illegally seizes and converts to his own use the entire natural flow of No Name Creek and supplemental water pumped into the stream by Respondent Tribe. That illegal seizure gave rise to this protracted litigation.

Walton I [3]

On September 15, 1970, Respondent Tribe initiated this case invoking the jurisdiction of the United States District Court for the Eastern District of Washington pursuant to 28 U.S.C. 1362.[4] By that action, Respondent Tribe seeks:

(1) to preserve and protect its invaluable reserved rights to the use of water in No Name Creek, and

(2) to have judicially declared that, pursuant to this Court's decisions, Tribe is entitled to reserved rights without which it cannot survive on its semi-arid Reservation.

After a comprehensive trial on the merits, the court below entered its October 25, 1978 Memorandum Opinion, referred to throughout as *Walton I*, in which it:

(a) sustained the Tribe's claim to *Winters* reserved rights to the use of water in No Name Creek with a priority of at least July 2, 1872, the date when the Colville Indian Reservation was created; [5]

---

[3] *Colville v. Walton*, 460 F. Supp. 1320 (U.S.D.C.E.D.Wa. 1978).

[4] 1362.Indian tribes. The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States. (Added Pub.L. 89-635, 1, Oct. 10, 1966, 80 Stat. 880.)

[5] *Walton I*, p. 1324-1326.

(b) denied Petitioner's contention that the Tribe's *Winters* reserved rights could be transferred to Petitioner Walton; [6]

(c) declared—factually in error—that Petitioner Walton was entitled to rights to 32 acres of land irrigated by the first purchaser from the Colville allottee,[7] contradicting the District Court's earlier and correct finding that: "The former Indian allottees had not irrigated these lands." [8] and

(d) affirmed the Certificate of Water rights issued in *1950* by the State of Washington to Petitioner Walton, declaring, nevertheless, that the Tribe's *Winters* reserved rights were prior and paramount to Petitioner Walton's rights claimed pursuant to state law.[9]

Walton II [10]

From *Walton I*, as declared by the Court of Appeals in *Walton II*, "Walton, the Tribes, and the State [of Washington] appeal parts of the decision." [11]

The Court of Appeals in *Walton II*:

(a) affirmed and applied the concepts of *Walton I* respecting this Court's *Winters Doctrine* [12] reserved rights and the method pursuant to which the *Winters* reserved rights for agriculture were to be measured; [13]

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[6] *Ibid.*, p. 1326.

[7] *Ibid., p.* 1329.

[8] *Ibid.*, p. 1324, which establishes the error as to the 32 acres. Note: see, *infra.*, at p. 6.

[9] *Ibid.*, p. 1324, which establishes the error as to the 32 acres. Note: see, *infra.*, at p. 6.

[10] *Colville v. Walton*, 647 F.2d 42 (CA 9, 1981); *cert. den.* 454 U.S. 1092 (1981).

[11] *Ibid.*, p. 46; Pet.Cert.App., p. 41a. As noted there, the United States "dropped its appeal," ftn. 6.

[12] *United States v. Winters*, 207 U.S. 564, 576 (1908).

[13] *Arizona v. California*, 373 U.S. 546, 599 (1963).

(b) likewise affirmed the holding of *Walton I* respecting the "Colville reserved rights" for a replacement fishery, citing the Court's *Winans* Decision [14] and its more recent decision of *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*,[15] explicitly declaring, nevertheless, that *Walton I* was in error in failing finally to adjudicate to Respondent Tribe a reserved right ". . . of water from No Name Creek for the development and maintenance of replacement fishing grounds." [16]

(c) declared that No Name Creek rises and flows its full length within the Colville Indian Reservation; has a ". . . direct effect on the health and welfare of the tribe"; ". . . water on the reservation is critical to the lifestyle of its residents and the development of its resources"; and that, under the circumstances, "We hold that state regulation of water in the No Name system was preempted by the creation of the Colville Reservation." [17] Predicated upon that factual recitation, the Court in *Walton II* further declared: ". . . water use on a federal reservation is not subject to state regulation absent explicit federal recognition of state authority";[18]

(d) declared, contrary to *Walton I*, that ". . . we conclude . . . an Indian allottee may sell his right to reserved water";[19] and

(e) further declared, in explicit terms, that the "non-Indian purchaser" acquires a reserved right to the extent that the "Indian allottee at the time title passes" was using water and, in addition, the first "non-Indian suc-

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[14] *United States v. Winans*, 198 U.S. 371, 381 (1905).

[15] 443 U.S. 658, 666 (1978).

[16] *Walton II*, p. 48; Pet.Cert.App., p. 45a.

[17] *Ibid.*, p. 52; Pet.Cert.App., p. 53a-57a.

[18] *Ibid.*

[19] *Ibid.*, p. 50; Pet.Cert.App., p. 50a.

cessor" acquires a right "to water" that is appropriated "with reasonable diligence after the passage of title," providing that the non-Indian successor must continuously use the acquired right or lose it through non-use.[20]

On August 18, 1981, Respondent Tribe filed its Petition for a Writ of Certiorari in this Court to review *Walton II*. On November 30, 1981, the petition was denied.

Thereafter on May 5, 1982, Respondent Tribe and Petitioner Walton proceeded to trial on the merits in conformity with the mandate of *Walton II*.

On August 31, 1983, the district court, after that trial on the merits, entered its unreported Memorandum Decision.[21] In that Memorandum Decision, the district court markedly violated the mandate contained in *Walton II*, declaring, in substance, that Respondent Tribe and Petitioner Walton had "equal" priorities for agriculture.[22] The district court, moreover, violated the mandate in *Walton II* respecting Respondent Tribe's right of fishery,[23] irrespective of the fact that the district court made this finding:

> "Dr. Koch's [Respondent Tribe's witness] testimony as to hatchery needs was uncontroverted. Based on his experience over the preceding six years. . . .

Dr. Koch declared that the Tribe's reserved water requirements totaled 350 acre feet annually. Further, respecting Dr. Koch's testimony, the district court declared:

> There being no other evidence in the record on this area, and no reason to question Dr. Koch's credibility, those figures will be accepted.[24]

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[20] *Ibid.*, p. 51; Pet.Cert.App., p. 52a.

[21] Pet.Cert.App., p. 16a.

[22] *Ibid.*, p. 26a.

[23] *Ibid.*, pp. 27a-28a.

[24] *Ibid.*, p. 29a.

In rejecting the mandate of *Walton II*, respecting Respondent Tribe's fishery, the district court declared that there would be available 187.2 acre feet annually for "other uses" in addition to the agricultural right.[25]

From the district court's Memorandum Opinion, Respondent Tribe sought review in the Court of Appeals.

Walton III[26]

Violations of *Walton II* Mandate

Violation of the mandate in *Walton II* is the hallmark of the district court's August 31, 1983 Memorandum Decision. *Walton III* turns markedly upon the district court's violation of the mandate in *Walton II* and, respecting those drastic departures by the district court, the Court of Appeals in *Walton III* said this:

> On remand the district court '[was] without power to do anything . . . contrary to either the letter or spirit of the mandate *construed in the light of the opinion of this court deciding the case.*'[27]

adding, under the heading "Scope of the Mandate," that the district court ". . . on remand was to 'calculate the respective rights of the parties,' " stressing in that connection that the district court was required to consider:

> . . . *the diligence with which the immediate grantee from the Indian allottees appropriated water, and the extent to which successor grantees, up to and including Walton, continued to use the water thus appropriated.*[28]

Walton III declared that, absent limiting Petitioner Walton's share by the "diligence" of the "immediate

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[25] *Ibid.*

[26] *Colville v. Walton*, 752 F.2d 397 (CA 9, 1985); *Colville v. Walton*, Order Denying Rehearing, 758 F.2d 1324 (CA 9, 1985).

[27] *Walton III*, p. 401; Pet.Cert.App., p. 5a. (Court's emphasis)

[28] *Walton III*, p. 402; Pet.Cert.App., pp. 7a-8a. (Emphasis supplied)

grantee" from the Colville allottee would permit ". . . any remote purchaser [to] . . . appropriate enough water to irrigate all irrigable acreage"—precisely the course adopted, in total error, by the district court. That erroneous course of conduct by the district court, declares *Walton III*, renders "meaningless" the "reasonable diligence requirement" of *Walton II*.[29]

In establishing the "reasonable diligence requirement," the court in *Walton III* "borrowed" from state law concepts giving rise to the "doctrine of 'prior appropriation' " which the court observed is adhered to by most Western States, including the State of Washington wherein this controversy arises. Having reviewed the basics of the "Doctrine of prior appropriation," the court in *Walton III* states: "To perfect an 'appropriation,' one must intend to appropriate a quantity of water, and diligently put it to a beneficial use." [30]

As implicitly stated by the court in *Walton III*, *sine qua non* is an "intent" to effectuate an appropriation. It likewise declared that ". . . intent and due diligence are necessarily interrelated." [31] On that background, the court in *Walton III* rejected the district court's findings in its Memorandum Decision of August 31, 1983, that Petitioner Walton ". . . exercised 'diligence' in beneficially applying water . . . given prevailing economic and technological conditions." [32] In totally rejecting that finding, the court in *Walton III* declared that:

> *We find this conclusion unsupported by the record.*
>
> The amount of land irrigated remained fairly constant throughout the 23-27 year period following

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[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*, at p. 402; Pet.Cert.App., p. 9a.

[32] Pet.Cert.App., p. 24a.

purchase by the Whams, the first non-Indian purchasers.[33]

Walton III further declared:

> We affirm the trial court's finding that sufficient water to irrigate 30 acres was appropriated with reasonable diligence by the original non-Indian purchasers [the Whams] and continually used by each subsequent owner, including Walton.[34]

Rejection of Walton's Claimed Reserved Rights for "water-saturated or subirrigated" Lands

In *Walton III* reference is made to the Court of Appeals' rejection of the argument that ". . . each preceding owner has farmed the water-saturated or subirrigated portion of his allotments. . . ." This, Petitioner Walton urges demonstrates reasonable diligence for purposes of perfecting a reserved right to water for irrigating the "water-saturated or subirrigated" portions of Walton's allotments. In rejecting Petitioner Walton's claim to rights for "water-saturated" lands in excess of 30 acres, the Court in Walton III said:

> *We find his [Petitioner Walton's] argument unpersuasive. The record indicates that this same acreage [above 30 acres] is subirrigated today.*[35]

The Court in *Walton III*, "proceeding *arguendo*," rejected the claim of Petitioner Walton to reserved water for "water-saturated or subirrigated" lands by stating:

> *. . . the subirrigated acreage . . . is being satisfied by the present subirrigation. To award additional water on this basis would result in a double allocation.*[36]

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[33] *Walton III.*, p. 403; Pet.Cert.App., 9a. (Emphasis supplied)

[34] *Ibid.*, Pet.Cert.App., 11a.

[35] *Walton III*, p. 403; Pet.Cert.App., p. 10a. (Emphasis supplied)

[36] *Ibid.* (Emphasis supplied)

In explicitly rejecting the concepts in the district court's August 31, 1983 Memorandum Decision purporting to constrict Respondent Tribe's right to 107.2 acres as distinguished from Respondent Tribe's 166.6 irrigable acres, the Court of Appeals in *Walton III* stressed that:

> Reducing the Indian allottees' share for non-use is in direct conflict with [the mandate in] *Walton II*. . . . The Court should have allocated the full 666.4 acre feet per year to the Indian allottees.[37]

Walton III applied the explicit language set forth above that the district court was required to comply with "the letter or spirit of the mandate construed in the light of the opinion of this court." [38]

Mandate Was Violated by Constricting All of Respondent Tribe's Reserved Rights

Walton III reiterated the mandatory aspects of *Walton II* and declared that:

> *Walton II* is clear. The Tribe has a reserved right 'to sufficient water to permit natural spawning of the trout.' . . . and the Indian allottees have right to share in the reserved water, based on the irrigable acreage owned, without any reduction for non-use."[39]

Proceeding on the basis of a water duty of 4 acre feet a year, the Court of Appeals in *Walton III* declared:

> On remand, the district court will allocate the reserved water among the parties, in accord with our opinion: 120 acre feet per year to Walton; 666.4 to the Indian allottees. . . ." [40]

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[37] *Ibid.*, p. 404; Pet.Cert.App. 12a.

[38] *Supra.*, p. 8.

[39] *Walton III*, p. 404; Pet.Cert.App., p. 13a.

[40] *Ibid.*, at 405 and 15a.

Provision is likewise made in *Walton III* that on remand the district court "will allocate reserved water" totaling "350 [acre feet] to the Tribe's fishery." [41]

By that award of 120 acre feet of water annually to Petitioner Walton, the Court of Appeals in *Walton II* assured Petitioner a water supply for his 30 acres—the only lands of Petitioner Walton requiring the application of water. As stressed by the Court of Appeals in *Walton III*, and extensively reviewed above—as fully proved by Respondent Tribe—the balance of Petitioner Walton's land which is "subirrigated today . . . is being satisfied by the present subirrigation. To award additional water on this basis would result in a double allocation"—decreeing to Petitioner Walton the right to waste water.[42]

ARGUMENT

Respondent Tribe Questions Transferability

It is with reluctance that Respondent Colville Confederated Tribe accepts the concept of "transferability" of its *Winters* reserved rights to non-Indian Walton, as enunciated in *Walton II* and applied in *Walton III*. The concepts of "transferability" were steadfastly opposed by Respondent Tribe in the District Court, the Court of Appeals, and here.[43] Nevertheless, to conclude 15 years of costly, time-consuming, and contentious litigation, Respondent Tribe seeks to end this litigation and to adjust to the concepts of "transferability" of Colville reserved rights to non-Indians if there can be strict adherence to the criteria respecting "transferability" established in *Walton II*, as construed and applied in *Walton III*.

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[41] *Ibid.*

[42] *Supra.*, at p.

[43] *Petition for Certiorari* on *Walton II*, denied; *supra.*, p. 8.

Sound argument opposing "transferability" of Indian reserved rights to the use of water, predicated upon the applicable Congressional enactments, impels a conclusion contrary to "transferability." In that regard reference is made to 25 U.S.C. 381 touched most lightly by Petitioner Walton in support of his request for review.[44] That slight reference to the only provision of the General Allotment Act which relates to the rights to the use of water is understandable. As pointed out in *Walton II*, the lands now occupied by Petitioner Walton ". . . are part of the reservation." The Court of Appeals then added that "The only mention of water rights in the Allotment Act suggests continued federal control. 25 U.S.C. § 381."[45]

The explicit language of 25 U.S.C. 381 rejects wholly the concepts of transferability. There it is declared that where, as on the Colville Indian Reservation, ". . . water for irrigation is necessary . . . for agricultural purposes, the Secretary of the Interior is authorized to prescribe . . ." rules and regulations ". . . necessary to secure a just and equal distribution. . . ." of water ". . . *among the Indians residing upon any such reservation. . . .*"

Confronted with that language, Petitioner Walton presents this remarkable argument that 25 U.S.C. 381 enables the Secretary of the Interior ". . . to enforce a just and equal distribution of water among Indian allottees. . . ."[46] That statement is incorrect. The explicit language respecting a just and equal distribution of water in short supply is ". . . among the *Indians* residing upon" the reservation—not only allottees. It is manifest, as on the Colville Reservation, that the water requirements of "the Indians residing" on the reservation are not constricted to the allottees.

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[44] Pet.Cert.App., p. 3, 16.

[45] *Walton II*, p. 53, ftn. 17; Pet.Cert.App., p. 56a.

[46] Pet.Cert.App., pp. 15-17.

Ignored likewise by Petitioner Walton is the fact that 25 U.S.C. 381 provides that ". . . no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor," other than the "just and equal distribution of water among the Indians residing upon" the Colville Indian Reservation. It is clearly improper for Petitioner Walton to state that the prohibition against any acquisition of rights to the use of water other than the just and equal distribution is limited to "riparian owners." Rather, the Act *proscribes* "appropriation or grant of water *to the damage of any other* riparian proprietor." Quite obviously Congress, in explicit language, declared and determined that a supply of water would always be maintained for a just and equal distribution "among the Indians residing" on the reservation. There is a single, reasonable conclusion from both the rational and the explicit langauge of 25 U.S.C. 381 and that is it was the intention of Congress to prohibit the non-Indian purchaser, for example, Petitioner Walton, from interfering with the absolutely essential supply of water for the Indians remaining on the reservation. As this Court fully recognized in both *Winters*[47] and *Arizona v. California*,[48] and stressed in *Walton I* and *Walton II*:

> Congress intended to deal fairly with the Indians by reserving waters without which their lands would be useless. . . . We hold that water was reserved when the Colville Reservation was created.[49]

An objective of establishing the Colville Indian Reservation was to provide ". . . a homeland for the Indians to maintain their agrarian society . . . that water was reserved to meet future as well as present needs," and, quoting from *Arizona v. California*, concluded ". . . 'that

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[47] *Winters v. United States*, 207 U.S. 564, 576 (1908).

[48] *Arizona v. California*, 373 U.S. 546, 599-601 (1963).

[49] *Walton II*, p. 47; Pet.Cert.App., p. 42a.

the only feasible and fair way by which reserved water for a reservation can be measured is irrigable acreage.' " [50]

Congress Severed Rights to the Use of Water from the Public Lands in Contrast to Reserving Indian Rights for Indians

The language of 25 U.S.C. 381 comports fully with the explicit language of this Court in *Winters* and *Arizona v. California* and the Court of Appeals in *Walton II*. There is no merit to Petitioner Walton's contention that Congress could have intended to render useless the lands of the Colville Indians residing on the reservation by permitting Petitioner Walton and other non-Indians to seize and monopolize the waters on the Colville Indian Reservation, as has been done by Petitioner Walton on No Name Creek.

Reference is made by Petitioner Walton that the General Allotment Act ". . . was passed 20 years before this Court in *Winters v. United States* . . . affirmed the existence . . ." of Indian rights.[51] That argument ignores the historic facts that Congress, as early as 1866,[52] was fully aware of the imperative need for water in Western United States as that Act and related Acts were construed by the Court in *Federal Power Commission v. Oregon Decision.*[53] Ignored likewise by Petitioner Walton is the fact that in 1877 the Congress of the United States severed all of the remaining rights to the use of water from the public lands—not the reserved lands, which include Indian lands—with the objective of permitting appropriation of rights to the use of water to render habitable the arid and semi-arid lands in Western United

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[50] *Ibid.*, at p. 48 and p. 44a.

[51] Pet.Cert.App., pp. 15, 16.

[52] Act of July 26, 1866, Ch. 262, Sec. 9 (14 Stat. 251-253).

[53] *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955).

States, as fully analyzed by the Court in *California-Oregon Power Commission v. Portland Cement Co.*[54]

The intentional severance of the rights to the use of water from the public lands by the Congress in 1877, 10 years antecedent to the enactment of the General Allotment Act and 25 U.S.C. 381, underscores the fact that Congress explicitly intended to *retain* the available water on the Indian reservations for the "Indians residing" on those reservations and *not* to authorize the transfer of those rights to the use of water to non-Indians in the status of Petitioner Walton.

Does "Transferability" Comport with Congressional Will?

In *Walton III* the Court of Appeals failed to apply the controlling principles of Congressional enactments pertaining to Indian rights and Indian people which require the most favorable interpretation on behalf of the Indians. Most assuredly the "most favorable" interpretation for the Indians of 25 U.S.C. 381 was clearly rejected in *Walton III*.[55] Moreover it is too clear for serious chal-

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[54] 295 U.S. 143, 162 (1935): "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. *Howell v. Johnson*, 89 Fed. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable 'shall remain and be held free for the appropriation and use of the public' are not susceptible of any other construction. The only exception made is that in favor of existing rights; and the only rule spoken of is that of *appropriation*. It is hard to see how a more definite intention to sever the land and water could be evinced."

[55] *Wilson, et al., v. Omaha Indian Tribe*, 442 U.S. 653, 665, *et seq.*, (1979): ". . . 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' "

lenge that Congress alone has the power to control the disposition of the reserved rights to the use of water and that it intended to reserve those rights for the Indians is the only proper conclusion from the language of 25 U.S.C. 381. This Court has specifically condemned judicial legislation.[56]

Equally lacking in merit is Petitioner Walton's contention that 25 U.S.C. 348 of the General Allotment Act abrogated 25 U.S.C. 381 by providing that a patent to non-Indians conveyed the land and all reserved rights ". . . free from all charge or encumbrance whatsoever. . . ."[57] That contention is frivolous. It is elemental that 25 U.S.C. 348 and 25 U.S.C. 381, being part of the General Allotment Act, must be read in *pari materai.* This Court, in its *Winans Decision,*[58] rejects out of hand a comparable assertion respecting reserved rights of fishing, declaring that:

> . . . the [reserved] right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.

adding that:

> The land department could grant no exemptions from its provisions. It makes no difference, therefore, that the patents issued by the department are absolute in form. They are subject to the treaty as to the other laws of the land. . . .[59]

which laws of the land necessarily include 25 U.S.C. 381.

Manifestly any patent that was issued to an allotment was subject to the "just and equal distribution" clause

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[56] *See, Tennessee Valley Authority v. Hill,* 437 U.S. 153, 173, 185-187 (1978); *United States v. City and County of San Francisco,* 310 U.S. 16, 19-30 (1939).

[57] Pet.Cert.App., p. 2-3, pp. 17 *et seq.*

[58] *United States v. Winans,* 198 U.S. 371, 381 (1905).

[59] *Ibid.*

of 25 U.S.C. 381. As this Court has declared, arid lands without water are "valueless." [60]

None of the cases cited by Petitioner Walton would vitiate the reserved rights doctrine, as petitioned for here by Petitioner Walton.

VIOLATION OF THE PRINCIPLES OF "DUE DILIGENCE" IN WESTERN WATER LAW ERRONEOUS BASIS OF PETITIONER'S CLAIM

Intent To Appropriate and Due Diligence Inseparable in Appropriation

In explicit detail in *Walton II* the court below reviewed the predicate for its determination that the Colville allottee could transfer his share of the limited water supply when he sold his allotment. That determination was based upon the mistaken concepts that Congress gave no ". . . consideration to the transferability of reserved rights"—ignoring 25 U.S.C. 381.[61] *Walton II*, on the basis of *dicta* from the *Powers Decision*,[62] concluded that the allottee was owner of an appurtenant reserved right to the use of water and that to deny the allottee the right to transfer any of his share of the reserved rights would constitute ". . . a diminution of Indian rights" but diminution could be accomplished, said the court in *Walton II*, only by ". . . express legislation or a clear inference of Congressional intent. . . ." [63]

Predicated upon those misconcepts, it is declared that the Colville allottee could, under the conditions set forth in *Walton II*, transfer his reserved rights. Those conditions of "transferability" were explicitly set forth and guidelines established strictly to measure the rights sub-

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[60] *Winters v. United States*, 207 U.S. 564, 576, *et seq.* (1908).

[61] *Walton II*, p. 49; Pet.Cert.App., p. 48a-49a.

[62] *United States v. Powers*, 305 U.S. 527 (1939).

[63] *Walton II*, p. 50; Pet.Cert.App., p. 50a.

ject to transfer. It was likewise concluded in *Walton II* that water over and above that being used by the allottee could be appropriated by the first "non-Indian successor" if appropriated "with reasonable diligence after the passage of title." [64]

In applying the concepts of "due diligence," the Court of Appeals in *Walton II* applied the principles governing the acquisition of rights to the use of water *outside* of Indian reservations to which it had historically adhered [65] and which principles are likewise adhered to by the Supreme Court of the State of Washington.

The laws of the State of Washington have no application here, yet the Supreme Court of that State has defined with specificity the critical elements of an appropriation. They are: (1) an intention to appropriate; (2) for a beneficial use; (3) for a stated quantity of water; and (4) by an effectuation of the intention with reasonable diligence.[66] *Wiel*, *Kinney*, and *Clark* in their

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[64] *Walton II*, p. 51; Pet.Cert.App., pp. 51a, 52a.

[65] *Hewitt v. Story, et al.*, 54 F. 510, 515 (CA 9, 1894).

[66] *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254, 255 (1894), the Court stressed that "where water is an important feature in the success of farming operations . . . ." it is inexcusable to divert and waste water required by others; *Offield v. Ish, et al.*, 21 Wash. 277, 57 Pac. 809, 810 (1899); *Longmire v. Smith, et al.*, 26 Wash. 438, 67 Pac. 246 (1901); *State ex rel. Ham. . . v. Superior Court of Grant County*, 70 Wash. 442, 126 Pac. 945 (1912), reviewing the need for an expression of intention as to uses for which water is to be applied; *Sander et al., v. Bull, et al.*, 76 Wash. 1, 135 Pac. 489 (1913), requisites as to elements of appropriation and as to dates and quantities of acres irrigated; *In re Waters of Doan Creek, State v. McBee*, 125 Wash. 14, 215 Pac. 343 (1923), need for "intention" for bona fide appropriation; *In re Water Rights in Alpowa Creek, State v. Anderson, et al.*, 129 Wash. 9; 224 Pac. 29, 31 (1924), "An appropriation of water consists of an intention to appropriate followed by a reasonable diligence in applying the water to a beneficial use"; *Hunter Land Co. v. Laugenour*, 140 Wash. 558, 250 Pac. 41 (1926).

authoritative works review the imperative necessity of proof of those critical aspects of an appropriation.[67] Petitioner Walton totally failed to prove an appropriation within the criteria established.

Predicated upon those precedents of "due diligence," the Court in *Walton II* remanded that question to the District Court.

Petitioner Walton's Failure to Sustain Burden as to Intent and Due Diligence

Failure of Petitioner Walton to sustain Petitioner's burden as to "intent" to appropriate rights to the use of water for land in excess of the 30 acres irrigated by the Wham family for a period of "23-27 years" precluded Petitioner Walton from claiming rights for more than 30 acres of land. *Walton III* declared that *Walton II* mandated that water could only be appropriated ". . . with reasonable diligence after the passage of title." [68] *Walton III*, moreover, rejected the district court's ruling that the successors in interest of the Wham family had ". . . exercised 'diligence in applying water . . . given prevailing economic and technological conditions' . . . ." [69] That rejection by the Court of Appeals in *Walton III* was succinctly stated as follows: "We find this conclusion unsupported by the record." [70]

Petitioner Walton fails totally to cite a single authority to support his argument to this Court. Petitioner

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[67] Wiel, *Water Rights in the Western States*, Vol. I, 3rd Ed., Sec. 478, at p. 502, An appropriation can be effectuated only to the extent of "the amount . . . actually used"; and at Sec. 480 p. 506, the "needs of the appropriator . . . determine the limit of the appropriator's rights." *Kinney on Irrigation and Water Rights*, Vol. II, 2d Ed., Sec. 877, p. 1547 and 1551. Clark, *Waters and Water Rights*, Vol. 5, Sec. 408.1, p. 73, *et seq.*, Sec. 410.4, p. 141.

[68] *Walton II*, p. 51; Pet.Cert.App., p. 52a.

[69] *Supra.*, at p. 9.

[70] *Ibid.*

Walton, in his statement of the case, cites two wholly irrelevant decisions rendered by the Supreme Court of the State of Oregon, neither of which are remotely related to the issues presented here.[71] Relative to the *Owyhee*[72] case, cited by Petitioner Walton, this statement is made:

> An Oregon decision, citing the foregoing case, held that while an appropriation of water may be made to propel a water wheel for lifting water from a stream for irrigation, the appropriation of the current necessaritly must be reasonable; and that under the circumstances of that particular case, it would be unreasonable to permit a water user to hold five or six times the quantity of his appropriation claimed for irrigation simply to operate a water wheel.[73]

In view of the reliance by Petitioner Walton upon decisions from the State of Oregon, *Weil*, under the heading "What Constitutes Diligence," declares that: "In California, Nevada and Oregon, lack of funds will not excuse delay,"[74] underscoring the importance of proceeding diligently, predicated upon a formulated "intent" to appropriate rights to the use of water. As stressed in *Walton III*, there was absolutely no "intent" for a protracted period of time by the Whams, the first non-Indian successors, to divert and use water for more than 30 acres. Moreover, there could be no "intent" by the Wham family to appropriate water for lands which were then and are today "water-saturated or subirrigated."

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[71] Pet.Cert., p. 13.

[72] *Ibid.*

[73] *Selected Problems in the Law of Water Rights in the West*, Miscellaneous Publication 418, U.S. Department of Agriculture, p. 170. [*In re Owyhee River*, 124 Oregon 44, 259 Pac. 292 (1927)].

[74] Vol. I, *Wiel, Water Rights in the Western States*, 3rd ed., Sec. 383, 413-414.

It is relevant here that even the district court noted that the Wham family:

> . . . were not piggish about taking only their fair share of the natural flow of No Name Creek [for a period of 23-27 years], always allowing a sufficient amount to flow to the south for the benefit of their [Colville Indian] neighbors on 901 and 903.[75]

It is manifest that this litigation stems directly from the fact that Petitioner Walton, contrary to the explicit law applied in *Walton III*, has undertaken to monopolize *all* of the waters of No Name Creek with disastrous consequences to Respondent Tribe and its members.

Failure to Perfect Appropriation by Petitioner Walton Is Here Involved—Not "Forfeiture and Divestment"

The violation by the district court of the mandate in *Walton II*, all as reviewed above, can scarcely be a justification for Petitioner Walton's charge that in some manner the alleged vested fee of the allottees ". . . were not subject to divestment upon a reversion, right of reentry, or forfeiture because of non-use. . . ." [76]

Fallacious reasoning by Petitioner Walton defeats the predicate for Petitioner's claim. Throughout it is asserted that in some manner *Walton II* and *Walton III* divest or cause to be forfeited rights to the use of water claimed by Petitioner Walton. In connection with that assertion, reference is made by Petitioner to the observation in *Walton III* that a claimant to water must "use-it-or-lose-it." [77] Forfeiture or divestiture were not involved. There was a total failure by Petitioner Walton to offer evidence to support a claim for water beyond the 30 acres. A large portion of *Walton III* is devoted to the fact that substantial portions of Petitioner Wal-

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[75] Pet.Cert.App., p. 19a.

[76] Pet.Cert., p. 18.

[77] *Ibid.*, at p. 19.

ton's lands are "water-saturated or subirrigated" with the water requirement "being satisfied by the present subirrigation." [78] It is a controlling predicate of Western Water Law that "beneficial use" is ". . . the basis, the measure, and the limit of the right" [79] to the use of water. As stressed by the Court of Appeals for the Ninth Circuit, ". . . it is a fundamental maxim of the law of waters that an individual's rights, no matter how measured or described, can never exceed his needs." [80] In a subsequent *Ahtanum Decision* that basic proposition is reiterated:

> It is plain that under Washington law. . . . *To perfect an appropriation* under the rules applicable in most western states, including the State of Washington, *the user must apply the water to a beneficial use with intent to appropriate.*[81]

It was Petitioner Walton's failure to sustain his own burden of proof respecting the appropriation of water beyond the 30 acres—not divestiture or forfeiture of vested rights, as presented to this Court.

Respondent Tribe's Reserved Rights for Fishery

Walton III succinctly summarized Respondent Tribe's rights of fishery, to which Petitioner Walton did not and cannot respond:

> The [district] court accepted the figures presented by Dr. Koch . . . [*see supra.*, at p. 7] which translated into 350 acre feet per year for the needs of the Tribal Fishery. . . . However, the court al-

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[78] *Walton III*, p. 403; Pet.Cert.App., p. 10a.

[79] 43 U.S.C. 372.

[80] *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 341 (CA 9, 1956); *cert.den.* 325 U.S. 988 (1957).

[81] *United States v. Ahtanum Irrigation District*, 330 F.2d 897, 904 (CA 9, 1965); *cert.den.* 381 U.S. 924 (1965). (Emphasis supplied)

> located only 187.2 acre feet per year to the fishery [and all other uses] . . . .
>
> *Walton II* is clear. The Tribe has a reserved right 'to sufficient water to permit natural spawning. . . .'
>
> The District Court was obligated to carry out the mandate of *Walton II*. . . . (mandate controlling as to all matters within its compass). . . .
>
> The Tribe is entitled to its full allocation, 350 acre feet per year.[82]

It is undisputed and indisputable that Respondent Tribe had actually appropriated and beneficially used 350 acre feet of water annually for a period of six years. As reviewed above, the Court of Appeals in *Walton* III recognized that appropriation of 350 acre feet and confirmed the right of fishery in Respondent Tribe.

It is likewise an indisputable fact that *Walton III*, as reviewed above, details the intentional violation by the district court of the mandate in *Walton II*, both as to the "due diligence" requirements imposed upon Petitioner Walton and likewise the explicit direction to adjudicate and determine the quantities of water to which Respondent Tribe is legally entitled for its fishery. On that background it partakes of the frivolous for Petitioner Walton to represent to this Court that "On remand the District Judge followed the Ninth Circuit's instructions precisely and with great care." [83]

Under the circumstances, it is too clear for question that review by the Court of the failure of the district court to comply with the mandate of *Walton II* is scarcely warranted.

In the paragraphs which follow, additional confusing aspects of Walton's Petition for Writ of Certiorari will be briefly summarized.

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[82] *Walton III*, pp. 404-405; Pet.Cert.App., pp. 12a-15a, "V. Omak Lake Fishery."

[83] Pet. Cert., p. 11.

Miscellaneous Misstatements by Petitioner Walton

Basic misstatements pervade all aspects of Petitioner Walton's "Statement of the Case." As stressed above, No Name Creek does not arise on Walton property, as falsely asserted.[84] It is likewise stated that only 107.2 acres of land are being irrigated by the Tribe out of 166.6 acres of land to which rights were adjudicated in *Walton I* for Colville Allotments 892, 901, and 903. Reason for Respondent Tribe's irrigating only 107.2 acres out of 166.6 acres stems from the ongoing, unconscionable violation of Respondent Tribe's rights by Petitioner Walton. By limiting Petitioner Walton to 30 acres of land—and enforcing that limitation in accordance with *Walton III*, Respondent Tribe should now be able to irrigate all of its lands to which rights have been finally adjudicated.

It is an unfortunate misrepresentation for Petitioner Walton to misstate to this Court that "The northernmost Indian allotment . . . can be irrigated from Omak Creek. . . ." [85] The northernmost Allotment No. 526 is *not* included in the 166.6 acres of land for which rights were finally adjudicated. Reference in that connection is made to the map on p. 3 above. To suggest that Allotment 892 can be irrigated from Omak Creek is an intentional misrepresentation. Not only is Allotment 892 far removed from Omak Creek, Omak Creek is already grossly overappropriated.

It is likewise irresponsibly stated that "Omak Creek . . . is not connected with the No Name Creek hydrological system." [86] That is totally incorrect. As can be observed from the map, Omak Creek flows across the No Name Creek Ground Water Basin and contributes

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[84] *Supra.*, at p. 3.

[85] Pet.Cert., p. 4.

[86] *Ibid.*

substantially to that Basin by deep percolation—an issue scarcely appropriate for this Court's consideration.

In an irresponsible and random fashion, it is believed inexcusably, Petitioner Walton has scattered references to acres, acre feet, sources of water, calculations, speculations, conjectures, and unsupported conclusions, many of which are contradictory and all of which are without sound documentation. For example, reference is made on page 5 of the Petition to 1346.4 acre feet, allegedly the quantity of water needed. However, on page 14 reference is made to a total claim of 1336.4 acre feet. It is unclear where those two figures came from since Petitioners figures of 120, plus 666.4 plus 350 actually add up to 1136.4 acre feet. On page 6 reference is made to 237.6 acre feet of water that is "not now used"—a total fiction—but on page 14 that figure is given as 137.2—presumably to establish an incredible posture that, in a stream that is grossly overappropriated, there is water available but "not used."

Petitioner Walton's contradictions cannot all be reviewed, nor is it necessary since the Court of Appeals in *Walton III* has clearly stated:

> On remand, the district court will allocate the reserved water among the parties, in accord with our opinion: 120 acre feet per year to Walton; 666.4 to the Indian allottees, and 350 to the Tribe's fishery. Since all parties have a priority date as of the creation of the Reservation, each should bear a proportionate share of any adjustment required by shortages of water.[87]

Enforcement on remand of that judgment explicitly directed by *Walton III* would end this controversy. Petitioner Walton would receive all of the water concerning which he offered proof, giving rise to *Walton III*.

---

[87] *Walton III*, p. 405; Pet.Cert.App. 15a.

CONCLUSION

After 15 years of litigation, although Respondent Tribe denies that non-Indian Walton is entitled to any Indian *Winters Doctrine* reserved rights, Respondent Tribe accepts the ruling of *Walton III*, albeit with reluctance.

Accordingly, Respondent Colville Confederated Tribes respectfully urge this Court to end this conflict by denying Petitioner Walton's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-3504

DC# CV 3831 RJM
Eastern Washington
(Spokane)

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

WILLIAM BOYD WALTON, *et al.*,
Defendants-Appellees.

[Filed May 29, 1984]

ORDER

Appellant's motion for voluntary dismissal of appeal No. 84-3504 is granted.

A certified copy of this order sent to the district court shall act as and for the mandate for this court.

For the Court:

/s/ Susan M. Johnson
SUSAN M. JOHNSON
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-4285

DC# CV-3421 RJM
DC# CV-3831 RJM
Eastern Washington
(Spokane)

COLVILLE CONFEDERATED TRIBES,
Plaintiff-Appellant,

v.

BOYD WALTON, JR., *et ux, et al.,*
Defendants-Appellees,

and

STATE OF WASHINGTON,
Defendant-Intervenor/Appellee.

[Filed October 3, 1984]

ORDER

Before: WALLACE, SCHROEDER and FLETCHER, *Circuit Judges*

The State of Washington intervened in this action on the basis of its asserted authority to grant water permits concerning the No Name system, a water source contained entirely within the boundaries of the Colville Reservation. In *Colville Confederated Tribes v. Walton,* 647 F.2d 42 (9th Cir.), *cert. denied,* 454 U.S. 1092 (1981),

this court, based primarily on the geographic facts of the case, conclusively determined that the State's regulation of water rights in the No Name system had been preempted by the creation of the Colville Reservation. *Id.* at 52.

On appeal after remand, appellants challenge the State's status as a party to this appeal. On July 10, 1984 this court ordered the State to identify its interest in this appeal and to show cause why it should not be dismissed as a party. Having reviewed the State's response, the court concludes that the interests identified are insufficient to support the State's continued status as a party to this appeal and thus dismisses the State.

Although dismissed as a party, the State is granted leave for the late filing of a brief as an amicus curiae within 21 days of entry of this order. Appellants may file a separate reply brief, if necessary, within 14 days of service of the State's brief.

Supreme Court, U.S.
FILED
JAN 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-125

In the Supreme Court of the United States

OCTOBER TERM, 1985

BOYD WALTON, JR., ET UX., ET AL., PETITIONERS

v.

COLVILLE CONFEDERATED TRIBES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held (i) that the evidence was insufficient to establish that petitioners' predecessors in interest, who purchased Indian allotments from the original allottees on the Colville Indian Reservation, had the requisite intent to irrigate 104 acres of land, and (ii) that petitioners therefore did not succeed to a reserved water right for the full amount of that acreage.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-125

BOYD WALTON, JR., ET UX., ET AL., PETITIONERS

v.

COLVILLE CONFEDERATED TRIBES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 752 F.2d 397, and the order denying rehearing (Pet. App. 58a-59a) is reported at 758 F.2d 1324. The prior opinion of the court of appeals (Pet. App. 36a-57a) is reported at 647 F.2d 42. The opinion of the district court (Pet. App. 16a-34a) is unreported. The prior opinion of the district court is reported at 460 F. Supp. 1320.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1985, and the petition for rehearing was denied on April 22, 1985 (Pet. App. 58a-59a). On July 19, 1985, Justice Rehnquist extended the

time within which to file a petition for a writ of certiorari to and including July 23, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns claims to water in a small watershed that lies wholly within the Colville Indian Reservation in the State of Washington. The watershed is drained by a small, non-navigable stream known as "No Name Creek." Arising from a spring on the Reservation, No Name Creek flows southward across the Reservation for approximately three miles and then empties into Omak Lake, a saline body of water that has no outlet and also lies entirely within the Reservation. Pet. App. 3a, 39a.

The Colville Reservation was established by Executive Order of July 2, 1872. 1 C. Kappler, *Indian Affairs, Laws and Treaties* 915-916 (2d ed. 1904). The Reservation originally included 2.8 million acres, but it was reduced to 1.3 million acres 20 years later when the northern half of the Reservation was restored to the public domain and opened to settlement. Act of July 1, 1892, ch. 140, § 1, 27 Stat. 62. In 1906, Congress ratified an agreement between a majority of the tribal members and the United States, which provided for the allotment of lands within the "diminished" reservation to individual Indians pursuant to the General Allotment Act of 1887 and for the settlement of surplus unallotted lands within the diminished Reservation. Act of Mar. 22, 1906, ch. 1126, § 2, 34 Stat. 80. Despite the alienation of some parcels to non-Indians, the whole of the "South Half" of the original area remains in reservation

status. See *Seymour* v. *Superintendent*, 368 U.S. 351 (1962). See Pet. App. 37a-38a.

Beginning in 1917, seven allotments were set aside in the No Name Creek watershed. Three of those allotments (Nos. 525, 2371 and 894) passed out of Indian ownership between 1921 and 1925. They were purchased in 1948 by petitioners, who are non-Indians. Three other of the seven allotments (No. 892 to the north of petitioners' property and Nos. 901 and 903 to the south) are held in trust by the United States for the benefit of the heirs of the original allottees and are farmed by the Colville Confederated Tribes under long-term leases. The seventh and northernmost allotment (No. 526), which is held by the United States in trust for the Tribes, was excluded from the instant water adjudication because water to irrigate it is potentially available from another source, so that water flow from the No Name Creek watershed would not be needed for that purpose. Pet. App. 2a-3a & n.1, 17a-19a, 24a-25a n.12, 38a-39a, 46a-47a.[1]

Apparently none of the land in the three former allotments now owned by petitioners was irrigated when they passed out of Indian ownership between 1921 and 1925. However, the first non-Indian purchasers (the Whams) brought about 30 acres under irrigation, utilizing water from No Name Creek, soon after they acquired the land.[2] The Whams and their

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[1] A map of the watershed, which was included as an appendix to the original opinion of the district court (460 F. Supp. 1320, 1336 (1978), is reproduced in the brief in opposition (at 3) filed by the Tribes.

[2] In addition, because of certain unique geological characteristics that maintained ground water at a high level, portions of allotments Nos. 2371 and 894 were sub-irrigated and

successors in interest continued to irrigate approximately the same amount of land for the next 23 to 27 years. When petitioner Walton acquired the three allotments in 1948, he immediately applied to the State for a permit to irrigate an additional 75 acres. The State granted a permit for 65 acres, " 'subject to existing rights' " (Pet. App. 38a). Using aluminum pipe and pumps installed following the bringing of electricity to the area, Walton irrigated approximately 104 acres in 1949 and 1950. Pet. App. 6a, 9a-11a, 18a-20a.

2. a. The Tribes filed this action against petitioners in 1970 in the United States District Court for the Eastern District of Washington. The Tribes alleged that they were the owners of the water in No Name Creek and that petitioners were appropriating the Creek's entire flow without their approval. The Tribes requested an injunction against this allegedly unauthorized appropriation. In their answer, petitioners contended that they were entitled to water from No Name Creek, both as successors in interest to the original allottees and by appropriation under state law. 460 F. Supp. 1320, 1324 (1978). The Tribes also asserted a right to water for maintaining the flow of No Name Creek for the spawning of the Lahontan cutthroat trout, an anadromous species introduced into Omak Lake in 1968 (*id.* at 1330). In 1973, the United States filed a separate action against petitioners and the State on its own behalf and on behalf of the Tribes and their members. The two actions were consolidated for trial.

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required no application of water from No Name Creek. Approximately 40 acres of such land were cultivated by the Whams. Pet. App. 18a & n.4.

b. The district court rendered its initial decision on October 25, 1978 (460 F. Supp. 1320). It held that when the Reservation was established, the United States reserved water to fulfill the purposes of the Reservation, including agriculture (*id.* at 1325-1326). The court further held that, upon the acquisition of an allotment by an individual Indian, the right to use a portion of the reserved water passed to the allottee and became appurtenant to his land, with a priority date of the creation of the Reservation, and that this right continued after the Indian acquired the allotted land in fee (*id.* at 1326). The district court concluded, however, that this reserved right could not be transferred to a non-Indian. In the court's view, upon the sale of his property to a non-Indian, an Indian allottee transferred a right only to such water as he had appropriated at the time of the conveyance, with a priority date of his first appropriation. Accordingly, the court held that petitioners succeeded to a right to irrigate only 32 acres, the amount of land under irrigation when they purchased the allotments, with a priority date of the appropriation of water to irrigate that acreage. *Id.* at 1326-1329.

The district court declined to recognize a reserved right to water for the spawning of the Lahontan cutthroat trout. Although it acknowledged that fish were a traditional food source for Washington Indians and that the natural source of fish on the Reservation was eliminated by the construction of dams on the Columbia River, the court deemed it unnecessary to recognize a reserved water right for the purpose of sustaining spawning grounds for the Lahontan trout so long as fish continued to be made available

to the Tribes from a federal hatchery. 460 F. Supp. at 1330.

In quantifying the water rights on the Reservation, the court found that, on average, 1,000 acre-feet of water are available each year. The court found that of this amount, 666.4 acre-feet are reserved to the members of the Tribes for potential irrigation of 166.6 acres on the three Indian-held allotments. 460 F. Supp. at 1330-1331.

3. On appeal, the court of appeals affirmed the district court's holding that when the Colville Reservation was established, the United States reserved the right to sufficient water to fulfill the purposes of the Reservation (Pet. App. 41a-47a). However, the court of appeals reversed the district court's determination that petitioners, as non-Indian fee owners of formerly allotted land, could not share in that reserved water right. Instead, following the earlier decisions in *United States ex rel. Ray* v. *Hibner*, 27 F.2d 909, 912 (D. Idaho 1928), and *United States* v. *Adair*, 478 F. Supp. 336, 348-349 (D. Ore. 1979), modified, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984), the court of appeals held that a non-Indian purchaser from an Indian allottee acquires a right, with a priority date of the establishment of the reservation, to the amount of water that was being appropriated by the allotte at the time title passed from Indian ownership plus any additional amount the non-Indian appropriated with "reasonable diligence" after acquiring title to the land (Pet. App. 47a-52a). The court of appeals also held that the Tribes have a right to use reserved water to maintain the Omak Lake fishery, including sufficient water to permit natural spawning of the trout (*id.* at 45a-46a). The court of appeals remanded the case to the district court to determine the

extent of the petitioners' right to share in the Indians' reserved water right and the scope of the Tribes' water right for the fishery (*id.* at 52a, 57a).[3]

4. On remand, the district court determined that the Whams brought approximately 30 acres under irrigation utilizing water from No Name Creek soon after acquiring the allotments between 1921 and 1925 (Pet. App. 17a-18a). The court further found that petitioner Walton had brought additional land under irrigation (for a total of 104 acres) soon after purchasing the three allotments in 1948 (*id.* at 20a-21a). The district court believed that under the court of appeals' mandate, only the diligence of petitioner Walton, not that of his non-Indian predecessors in interest, was relevant in determining the scope of petitioners' water right; on this premise, it held that Walton personally had exercised reasonable diligence in irrigating a total of 104 acres and that he therefore had a reserved water right to irrigate 104 acres (*id.* at 20a-22a). Alternatively, the court held that if the actions of the prior non-Indian owners were relevant, those prior owners had exercised reasonable diligence (even though they had not irrigated more than

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[3] The court of appeals also held that that the State of Washington does not have authority to regulate water in the No Name Creek water system and that petitioners' state water permit therefore was of no force and effect (Pet. App. 52a-57a). The State (but not petitioners) petitioned for a writ of certiorari to review the court of appeals' holding that the State of Washington did not have regulatory jurisdiction (No. 81-421), and the Tribes sought review of the court of appeals' holding that a non-Indian may succeed to the allottee's right to share in the reserved water right (No. 81-321). The Court denied both petitions. 454 U.S. 1092 (1981). The question of the State's regulatory authority is no longer involved in this case, and petitioners have not raised it in the instant petition.

30 acres during the intervening 23 to 27 years) in light of "prevailing economic and technological conditions" (*id.* at 23a-24a). The conditions to which the court referred were the depression during the 1930s, World War II, the primitive nature of irrigation equipment at that time, the fact that alumium pipe had not yet been perfected, and the absence of electricity in the area until 1949 (*ibid.*).

In quantifying the respective rights, the district court held that petitioners were entitled to a total of 416 acre-feet annually (4 acre-feet per acre for 104 acres) and that the allotments held in trust for Indians had an appurtenant reserved right to 666.4 acre-feet of water annually (4 acre-feet per acre for 166.6 acres). These rights totalled 1082.4 acre-feet, an amount in excess of the 1000 acre-feet that the court concluded were available in the No Name Creek basin in an average year. The court therefore reduced these allocations on a pro rata basis to 384 and 616 acre-feet, respectively. Pet. App. 24a-26a. The court believed that the Tribes were not independently entitled to a reserved water right for their fishery and that the court of appeals had contemplated only that the Tribes could reallocate to the fishery some of the irrigation water allocated to the allotments that were still in Indian ownership. Because not all of the irrigable acreage in the Indian-owned allotments was actually under irrigation, the court held that the amount of the water allocated to the Indians that was not being used for irrigation purposes (187.2 acre-feet) was available for fishery purposes at the present time. *Id.* at 26a-34a.

5. The court of appeals reversed and remanded (Pet. App. 1a-15a). It first concluded that the district court had erred in believing that only the dili-

gence of petitioner Walton was relevant in determining petitioners' entitlement to a reserved water right. Rather, the court of appeals explained that it was necessary to ascertain whether petitioners' non-Indian predecessors in interest had exercised reasonable diligence in appropriating water to irrigate 104 acres after the three former allotments passed out of Indian ownership. Pet. App. 6a-8a.

Applying this rule, the court of appeals concluded that the first non-Indian owners, the Whams, had exercised reasonable diligence in appropriating water to irrigate 30 acres (Pet. App. 10a-11a). However, it held that the Whams and the subsequent non-Indian owners had not satisfied the reasonable diligence test during the ensuing period of between 23 and 27 years in irrigating the full 104 acres for which petitioners now claim a reserved water right. The court reasoned that in order to perfect such a right, it is necessary for the owner of the land to (i) have the intent to appropriate water for the full acreage for which the right is claimed, and (ii) diligently put water to beneficial use on that acreage (*id.* at 8a-9a). In the court of appeals' view, the evidence was insufficient to support an inference that petitioners' non-Indian predecessors had the intent to appropriate water to irrigate any land in excess of the 30 acres that were brought under irrigation soon after the Whams purchased the allotments in the 1920s (*id.* at 9a-10a). The court therefore found it unnecessary to determine whether petitioners' predecessors in interest satisfied the second part of the test by actually exercising due diligence in appropriating water for the full 104 acres. In particular, the court found it unnecessary to consider whether the political and economic conditions resulting from the Great Depression and World War

II could be taken into account in determining whether water had been appropriated with reasonable diligence. *Id.* at 10a n.4.

With respect to the Omak Lake fishery, the court of appeals reversed the district court's holding that the Tribes were entitled only to reallocate to that use water that had been reserved for irrigation purposes. The court of appeals instead held that under its prior opinion in this case, the Tribes had an independent reserved right to water for the fishery in the amount of 350 acre-feet per acre annually—the amount accepted by the district court, on the basis of expert testimony, as necessary to support the fishery. Pet. App. 12a-15a.

In light of its various rulings, the court of appeals directed the district court on remand to allocate 120 acre-feet of water annually to petitioners (4 acre-feet per acre for the 30 acres petitioners' predecessors in interest had irrigated with reasonable diligence), 666.4 acre-feet for irrigation of the Indian allotments, and 350 acre-feet for the fishery (Pet. App. 15a). These rights total 1136.4 acre-feet, an amount in excess of the 1000 acre-feet available in an average year (*id.* at 13a, 15a). Because all of these reserved rights have a priority date of the establishment of the Reservation, the court ordered that the allocations be reduced on a pro rata basis in the event of a water shortage in any given year (*id.* at 15a).

ARGUMENT

The court of appeals concluded, in the particular circumstances of this case, that petitioners' non-Indian predecessors in interest did not have the requisite intent to divert water from No Name Creek to irrigate more than the 30 acres of land that had been irrigated

for approximately 25 years prior to petitioners' purchase of the three allotments in question. This fact-bound ruling does not conflict with any decision of this Court or another court of appeals. It therefore does not warrant further review.

1. The court of appeals' holding in this case is fully consistent with prior decisions in this area, including the court of appeals' own 1981 decision in this case. The court of appeals held in its 1981 decision that the non-Indian purchaser of an allotment on an Indian reservation succeeds to a right to share in the water that was reserved upon establishment of the reservation (Pet. App. 47a-52a). That prior holding was consistent with this Court's decision in *United States* v. *Powers*, 305 U.S. 527, 532-533 (1939). See also *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 342 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957); *United States ex rel. Ray* v. *Hibner*, 27 F.2d 909 (D. Idaho 1928). See note 7, *infra*.

In *Powers*, the Court expressly did "not consider the extent or precise nature of [the non-Indian landowners'] rights in the waters" (305 U.S. at 533), apparently because not all of the parties necessary for the quantification of the water rights were before the Court. See *United States* v. *Powers*, 94 F.2d 783, 786 (9th Cir. 1938), aff'd, 305 U.S. 527 (1939). However, in its prior opinion in the instant case, the court of appeals did elaborate upon the nature of the right the non-Indian purchaser of an allotment can acquire. The court held that although an Indian allottee does not lose (by non-use) the right to a share of the reserved water right, this characteristic does not apply to the non-Indian purchaser, who is "under no competitive disability vis-a-vis other water users" (Pet. App. 52a). The court of appeals instead adopted the rule announced in *United States ex rel.*

Ray v. *Hibner*, 27 F.2d at 912, under which the non-Indian purchaser of an allotment acquires a right, with a priority date of the establishment of the reservation, to the water actually being appropriated by the Indian allottee at the time title passes and any additional water that is appropriated by the non-Indian with reasonable diligence after passage of title (*ibid.*). Since its 1981 opinion in this case, the Ninth Circuit has adhered to the *Hibner* rule in two other cases. See *United States* v. *Adair*, 723 F.2d 1394, 1417 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984); *United States* v. *Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984). Petitioners have cited no appellate decisions rejecting the *Hibner* rule, and we are aware of none. See note 8, *infra*. There accordingly is no occasion—especially in the circumstances of this case (see pages 18-19, *infra*)—for this Court to consider the *Hibner* condition to a non-Indian's perfecting of a reserved water right on a former allotment.

2. In the end, petitioners themselves do not even object to the *Hibner* rule.[4] Indeed, they concede that "[t]he fact that non-Indian landowners, in contrast to Indians, are not presumed to be at any competi-

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[4] Nor did petitioners object to the *Hibner* rule when this case previously was before the Court. Although the Tribes and the State of Washington petitioned for writs of certiorari to review the court of appeals' 1981 decision, petitioners did not do so. See note 3, *supra*. Moreover, on that prior occasion, although petitioners did not specifically discuss in their brief in opposition the "reasonable diligence" condition that the court of appeals had directed to be considered on remand, they vigorously defended the court of appeals' ruling as being in "perfect accord" with settled precedent of more than 50 years' standing, specifically including the decision in *Hibner*. See 81-321 & 81-421 Tribe's Br. in Opp. at 7-8 & n.3, *Colville Confederated Tribes* v. *Walton*, *supra*.

tive disadvantage could possibly justify application of a general principle designed to reward diligence, and punish a lack thereof, in the development and continued beneficial application of a scarce resource." See Pet. 19.[5] They object only to the court of appeals' application of the rule to the particular circumstances of this case and to the court's resulting conclusion that the evidence does not support an inference that petitioners' predecessors in interest had the requisite intent, after the parcels passed out of Indian ownership in the early 1920s, to divert water to irrigate more than 30 acres. This fact-bound issue does not warrant review.

The requirement of an intent on the part of the prior non-Indian owners to irrigate the full 104 acres to which petitioners now claim a reserved water right

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[5] Petitioners now do object to one aspect of the court of appeals' reasoning in its 1981 opinion to which they did not object when this case previously was before the Court. See Pet. 15-18. They contend that the court of appeals should have identified the source of a non-Indian's right to share in a portion of the reserved water right as being Section 5 of the General Allotment Act, 25 U.S.C. 348, rather than the policy of that Act of assuring that the allottee realizes the full value of the allotment. However, Section 5 simply provides that a patent will be conveyed to the Indian allottee (or his heirs) at the end of the trust period, "free of all charge or incumbrance whatsoever." It does not address the distinct question of the rights of a non-Indian purchaser from the allottee after the patent has issued. In any event, we fail to see what difference it makes for present purposes what the precise rationale is for concluding that a non-Indian may share in the reserved water right when he purchases an allotment, since the court of appeals agreed with petitioners that a non-Indian may do so and petitioners ultimately do not object to the *Hibner* "reasonable diligence" prerequisite to perfecting that right.

is compelled by the principles underlying the rule announced in *Hibner* and applied by the Ninth Circuit in this case and *United States* v. *Anderson*, *supra*, and *United States* v. *Adair*, *supra*. The court in *Hibner* stated (27 F.2d at 912):

> The status of the water right after it has passed to others by the Indians seems to be somewhat different from while such right is retained by the Indians, because the principle invoked by the courts for the protection of the Indian as long as he retains title to his lands [*i.e.*, that the water right is not lost through non-use] does not prevail and apply to the white man, and the reason for so holding is that there was reserved unto the Indians the absolute right to own and use in their own way the water for their lands, while the white man, as soon as he becomes the owner of the Indian lands, is subject to those general rules of law governing the appropriation and use of the public waters of the state, and would, as grantee of the Indian allotments, be entitled to a water right for the actual acreage that was under irrigation at the time title passed from the Indians, and such increased acreage as he might with reasonable diligence place under irrigation, which would give to him, under the doctrine of relation, the same priority as owned by the Indians; otherwise, the application of any other rule would permit such grantee for an indefinite period to reclaim the balance of his land and withhold the application of the water to a beneficial use, which is against the policy recognized in the development of arid lands.

The *Hibner* rule thus is intended to conform in some measure to the principles that govern the appropria-

tion of water by a non-Indian on lands within the state generally, while at the same time giving effect to the reservation priority date where the non-Indian has adhered to those state-law appropriation principles in other respects.

The court of appeals' most recent decision in this case faithfully adheres to this rationale of the *Hibner* rule. As the court of appeals explained (Pet. App. 8a-10a), it is firmly established under the law of the State of Washington that an intent to appropriate water is a necessary prerequisite to acquiring a water right, quite aside from the matter of diligence in doing so. Thus, the Washington Supreme Court has stated that "[a]ppropriation of water consists in the *intention* accompanied by reasonable diligence to use the water for the purpose originally contemplated at the time of its diversion." *Offield* v. *Ish*, 21 Wash. 277, 280-281, 57 P. 809, 810 (1899) (emphasis added). Accord, *Longmire* v. *Smith*, 26 Wash. 439, 448-449, 67 P. 246, 249-250 (1901); *In re Waters of Doan Creek*, 125 Wash. 14, 24-25, 215 P.2d 343, 346-347 (1923); *In re Water Rights in Alpowa Creek*, 129 Wash. 9, 13-15, 224 P. 29, 31-32 (1924); *United States* v. *Big Bend Transit Co.*, 42 F. Supp. 459, 468-469 (E.D. Wash. 1941).

Against this background of state law, petitioners are in no position to object to the legal requirement that there be a showing of an intent by their predecessors in interest to irrigate the full 104 acres to which they now claim a water right with a priority date of the establishment of the Reservation. And in fact petitioners at bottom do not even appear to challenge the requirement that they establish such an intent. Their argument instead seems to be that the court of appeals reached an incorrect result on the

question of intent in the particular circumstances of this case. In their view, the court of appeals unfairly penalized them for a lack intent on the part of their predecessors in interest to do more than was reasonably possible in light of existing economic and technological conditions. See Pet. 19-20.

Petitioners' argument is seriously flawed. The court of appeals expressly did not reach the question of whether economic or technological obstacles should be taken into account in determining whether a landowner has exercised reasonable diligence in applying water to the maximum extent of his irrigable acreage where the landowner actually intended to do so as soon as circumstances permitted. The court therefore did not decide whether the water right for the entire acreage in such a case would relate back to the original priority date of the establishment of the reservation. The court simply held that in this case, because there had been no showing that the prior non-Indian owners had intended to irrigate more than 30 acres,[6] the priority date for the entire acreage petitioners brought under irrigation in 1949 does not relate back to the date of the Reservation, as does the priority date for the 30 acres first brought under irrigation many years earlier. Contrary to petitioners' contention (Pet. 19-20), there is nothing unfair about that result. It simply conforms the scope of the non-Indian's reserved water right to the intent and expectations of the original non-Indian owner when he first purchased the allotment from the Indian allottee. And it thereby conforms the limita-

[6] It is irrelevant for these purposes whether their lack of intent was due to technological or economic limitations they perceived. Such factors no doubt frequently place practical limitations on the anticipated extent of diversions.

tion on that right to the limitation on the justifiable expectations of subsequent purchasers as well. Nor is there any indication that petitioner Walton had any different expectation when he purchased the allotments in 1948.

Moreover, the price the original non-Indian purchaser paid for the allotments presumably was calculated on the basis of the water development potential of the acreage that reasonably was believed by the parties to be practicably irrigable under conditions extant at the time of the original transaction. As a general proposition, an allottee's ability to convey to a non-Indian a right to share in the reserved water right for the acreage believed to be practicably irrigable at the time the allottee sells the allotment would be consistent with the purpose of the General Allotment Act of ensuring that the allottee realizes the maximum benefit from the allotment. Pet. App. 49a-51a; *United States* v. *Anderson*, 736 F.2d at 1362. But that purpose by definition could not be served by recognition of a water right with a date-of-reservation priority for the far greater acreage that the original non-Indian purchaser did *not* intend to irrigate when he purchased the allotment, since a water right for that additional acreage presumably would not have been within the contemplation of the parties at the time of the original conveyance and would not have been taken into account in the calculation of the purchase price. As a result, recognition of a reserved water right to that greater extent would constitute a windfall for the non-Indian successors in interest who were able to exploit the unanticipated technological or economic developments. In addition, where, as here, there is insufficient water to satisfy all water rights with a date-of-reservation

priority, that windfall would be conferred at the expense of the Tribe and its members, whose reserved rights would have to be reduced on a pro rata basis in order to accommodate the expanded non-Indian reserved water right.

3. In sum, the court of appeals correctly applied settled principles that follow from this Court's decision in *Powers* and the *Hibner* rule, and the application of those principles to the circumstances of this case was fair and reasonable.[7] This case would not in any event be an appropriate vehicle for the consideration of broader questions regarding the extent to which non-Indian purchasers of allotments may share in the water rights that were reserved upon establishment of an Indian reservation. It arises out of atypical and narrow circumstances involving a small stream that lies wholly within the Colville Reservation and irrigation undertaken by a single non-Indian many years after the land passed out of Indian ownership.[8] On other reservations, non-

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[7] The United States has not reached a concluded view on whether, in an appropriate case, *Powers* should be reconsidered or its possible implications qualified. That question is not presented here, since the Court previously denied the Tribes' certiorari petition presenting the question of the transferability of the reserved water right and the Tribes have not again sought review of that holding at the present time.

[8] In a general adjudication of rights to the waters of the Big Horn River in Wyoming, a state district court held that non-Indian purchasers of allotments did not succeed to a right to share in the water right reserved by the Treaty of Fort Bridger, July 3, 1868, United States—Shoshonee Tribe—Bannack Tribe, 15 Stat. 673 *et seq.*, when the Wind River Reservation was established. *In re the General Adjudication of All Rights to Use Water in the Big Horn River System,*

Indians may have purchased land that either was included in an Indian irrigation project or was expected to be so included. In those cases, the original non-Indian purchaser might have had a more concrete expectation of sharing in the reserved water right to a specifically identifiable degree, and his entitlement to do so might have been more clearly expressed at the time of the initial purchase. The full dimension of the rights that might be claimed by non-Indians on other reservations and the extent to which any such claims are rooted in law or firm expectations remain unclear. The broader issues concerning the interplay of the water rights of Indians and non-Indians on Indian reservations generally therefore are not ripe for resolution at this time. Especially in these circumstances, the limited impact of the decision below further counsels against review by this Court.[9]

No. 101-234 (Wyo. Dist. Ct. May 24, 1985). Several of the non-Indian claimants have taken appeals from this holding to the Wyoming Supreme Court, where the appeals are still pending. Nos. 85-203 et al.

[9] Petitioners have not sought review of the court of appeals' holding that the Tribes have a reserved right to 350 acre-feet of water annually for the fishery in Omak Lake to replace the Tribes' historic fisheries on the Columbia River that were destroyed by the construction of dams. Pet. App. 12a-15a, 44a-46a. Nevertheless, we wish to bring to the Court's attention the fact that the Tribes were awarded a judgment under the Indian Claims Commission Act, ch. 959, 60 Stat. 1049 *et seq.*, in the amount of $3,257,083 for the loss of their fisheries on the Columbia River. *Confederated Tribes* v. *United States*, 43 Ind. Cl. Comm'n 505, 543-551 (1978). Our brief in opposition in 1982 addressing the fishery issue was prepared without awareness of this judgment. See 81-321 & 81-421 U.S. Br. in Opp. at 23-25, *Colville Confederated Tribes* v. *Walton*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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